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# CALIFORNIA REPORTER

## 137 PACIFIC REPORTER

### SECOND SERIES

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22 Cal.2d 169

#### **PEOPLE v. KELLEY.**

Cr. 4419.

Supreme Court of California.

May 3, 1943.

#### **1. Criminal law** ⇨394

Evidence illegally obtained from accused is admissible in the state courts in California.

#### **2. Constitutional law** ⇨266

Admission of evidence obtained through an illegal search and seizure does not violate "due process of law" guaranteed by the Fourteenth Amendment to the Federal Constitution. U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

#### **3. Telegraphs and telephones** ⇨79

Where officers related what was said to them when they answered the telephone in apartment where accused was arrested but there was no interchange of conversation and no answer so far as accused was concerned, accused was not a "sender" within the Federal Communications Act forbidding persons unauthorized by sender from intercepting or divulging communications by wire. Pen.Code, § 337a, subd. 2; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

See Words and Phrases, Permanent Edition, for all other definitions of "Sender".

#### **4. Telegraphs and telephones** ⇨79

Intrastate messages come within the Federal Communications Act forbidding persons not authorized by sender to intercept or to divulge contents of communications by wire. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

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#### **5. Telegraphs and telephones** ⇨79

Where officers related what was said to them when they answered telephone in apartment where accused was arrested but accused in fact was not a party to the conversation, accused was not a "sender" within the Federal Communications Act forbidding persons unauthorized by sender from intercepting or divulging communications by wire on ground that the telephone messages would be relevant only if they were intended for accused. Pen. Code, § 337a, subd. 2; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

#### **6. Telegraphs and telephones** ⇨79

Only the "sender" of a communication is entitled to the protection of the Federal Communications Act forbidding persons unauthorized by sender from intercepting or divulging communications by wire or radio. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

#### **7. Criminal law** ⇨1169(1)

Admission of evidence explaining the term "insured" in a telephone message received by officers at accused's apartment and testimony that Bay Meadows and Keeneland were race tracks operating in the United States on day of accused's arrest at which tracks horses mentioned by telephone callers were racing, if erroneous, was not prejudicial, where the messages excluding the explained terms, supported conviction for occupying an apartment with paraphernalia to record bets on horse races. Pen.Code, § 337a, subd. 2.

#### **8. Criminal law** ⇨386

In prosecution for occupying apartment with paraphernalia to record bets on results of horse races, telephone conversations received by officers at accused's apartment after his arrest were admissible. Pen.Code, § 337a, subd. 2.

### 9. Gaming ☞98(5)

Evidence supported conviction of occupying apartment with paraphernalia to record bets on results of horse races. Pen. Code, § 337a, subd. 2.

### 10. Criminal law ☞1169(1)

In prosecution for occupying apartment with paraphernalia to record bets on results of horse races, error in admission of testimony that racing bulletins named as entrants in races run on day accused's apartment was entered, horses mentioned in telephone conversations received by officers at accused's apartment was harmless. Pen.Code, § 337a, subd. 2.

### 11. Gaming ☞98(5)

The "corpus delicti" of occupying an apartment with paraphernalia to record bets on results of horse races was established by proof that accused occupied a room with bookmaking paraphernalia for the purpose of recording or registering bets upon horse races. Pen.Code, § 337a, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

CARTER and PETERS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

George Kelley was convicted of occupying an apartment with books, papers, apparatus, and paraphernalia for the purpose of recording bets on results of horse races, and he appeals.

Affirmed.

Prior opinion, 122 P.2d 655.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

George Kelley complains that his conviction upon the charge of occupying an apartment for the purpose of bookmaking, contrary to the provisions of section 337a, subdivision 2, of the Penal Code, was obtained by the use of evidence received in violation of section 605 of the Federal Communications Act (Act of June 19, 1934,

c. 652, 48 Stat. 1064, 1103, 47 U.S.C. § 605, 47 U.S.C.A. § 605). Upon appeal, he challenges an order denying him a new trial upon grounds which raise questions concerning constitutional rights and also the scope of the federal statute.

According to the testimony of police officers, they knocked on the door of an apartment two or three times before it was opened by the appellant. Although he told them that, for several hours, he had been sitting in the room reading, the venetian blinds were closed and the room was quite dark. They immediately noticed that the telephone wires were disconnected, but a few minutes before, they had heard the bell of the instrument ring. Upon reconnecting the wires, the bell rang at least 50 times during the two hours they remained there.

One of the officers testified that when he answered the telephone "The voice said 'Hello, Jimmy?' And I said 'Yes.' He said 'This is Walter, give me three to win on 326.'" Upon the next call "it said 'This is Marge,' and asked for George. It said 'This is Marge, one to place on Even Mix, one to place on Lady Vain.' The next time the lady called and said 'This is Mich, I want a combination bet on 301 to 344, one across.'" Again the bell rang, the officer testified, "A voice said 'This is Dove, George, I want two across on a parlay on Downy Billow to Mt. Vernon II,' and the next time a lady's voice said 'This is Helen, give me the following bets: 633, one to place, one to show, insured; 647 parlayed to 633, one to place; 685 parlayed to 722, one to place; 671, one to place insured; 685 parlayed to 722, two to place.'" According to the witness, he had a record of a number of other messages of the same character received by him while he was in the apartment, the appellant being seated about eight feet from the telephone.

The officers also stated that the appellant first told them his name was Jimmy. However, when they repeated a telephone conversation in which the person calling asked for Jimmy, Kelley then said his name was George. He had a key to the apartment. In a drawer near the telephone and in a desk in another room, the officers found blank betting markers, of a common type used for the recording of the name, number, number of a horse, and the amount of the wager. After the officers entered the apartment, they reconnected the radio



and, without changing the selection dial, they heard the results of horse races being broadcast.

To explain the messages received over the telephone, one of the officers, who said he knows the methods by which bookmaking is conducted, testified that he compared the numbers, names and symbols given by the callers on the telephone with certain racing bulletins and found that each horse mentioned by them was racing on that particular day at "Keeneland" or "Bay Meadows," which are race tracks in the United States.

The appellant asserts that the evidence is insufficient to support the verdict. More specifically, he contends that the admission in evidence of intercepted telephone messages without the consent of the sender was in violation of section 605 of the federal statute and of the 14th Amendment to the Constitution of the United States; that this evidence was obtained by unlawful search and seizure in violation of article I, section 19, of the California Constitution, and the 14th Amendment to the Constitution of the United States; and that other evidence was erroneously received against him.

Answering these contentions, the attorney general takes the position that the Federal Communications Act, *supra*, is a rule of evidence concerning federal officers and federal courts and does not prohibit the admission in a state court of evidence obtained over the telephone by state officers. He also maintains that the admission of intercepted telephone conversations by the courts of California is not in violation of its Constitution, nor of that of the United States. Accordingly, he says the evidence amply justifies the conviction of the appellant. In support of the judgment, he urges that it was not necessary for the prosecution to prove the corpus delicti beyond a reasonable doubt before receiving evidence of admissions, a *prima facie* showing only being all that is required.

Concerning other points relating to the rulings, upon evidence, the People insist that the officer did not state the meaning of the signs and symbols which are shown in the evidence offered to prove bookmaking except to explain the meaning of the word "insured" in betting parlance, and to identify the two race tracks. And it is said that if the court erred in permitting the officers to use scratch sheets which they had procured elsewhere as the basis

of their testimony relating to the races run on the day the appellant was arrested, such error was harmless, since the conviction may stand without that evidence.

[1] Although the federal courts forbid the introduction of evidence illegally obtained from the accused upon his timely motion for its exclusion (*Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426; *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A.1915B, 834, Ann.Cas.1915C, 1177; *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746), the accepted rule in most of the states, including California, is to the contrary. *People v. Gonzales*, 20 Cal.2d 165, 124 P.2d 44, certiorari denied by U. S. Supreme Court, 63 S.Ct. 55, 87 L.Ed. 528; *Herrscher v. State Bar*, 4 Cal.2d 399, 49 P.2d 832; *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; *People v. Le Doux*, 155 Cal. 535, 102 P. 517, for cases from other jurisdictions see note 88 A.L.R. 348. The policy underlying the majority doctrine is said to be that courts should not be required collaterally to investigate the source from which prosecutors have obtained evidence otherwise admissible. *People v. Mayen*, *supra*, 188 Cal. pages 251, 254, 255, 205 P. 435, 24 A.L.R. 1383.

[2] In the recent case of *People v. Gonzales*, *supra*, the California cases involving the admissibility of evidence obtained by unlawful search and seizure were reviewed, and the court considered the question whether the use of evidence so secured was a denial of due process of law guaranteed by the Fourteenth Amendment. It was concluded that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment.

This decision is determinative of the contentions made by the appellant to the contrary, although it is not a complete an-

swer to the problem. For in the present case, because the challenged evidence consists of the reports of telephone conversations, a broader question is presented, requiring a construction of the Federal Communications Act, *supra*.

The appellant contends that not only were the contents of the telephone messages procured by means within the prohibitions of the statute, but also that they are inadmissible because they were offered in evidence by means of a witness who, in testifying, violated that law.

Section 605 of the Federal Communications Act provides as follows: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; \* \* \* and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto \* \* \*."

Assuming that the statute applies to evidence offered in a state court, the admissibility of the testimony given by the officers primarily depends upon the status of the appellant. Is he a person entitled to the protection of the act against the divulgence of the telephone messages in question?

In *Nardone v. United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314, the court held that the government's introduction of transcripts and recordings of intercepted interstate messages as evidence in the trial of a criminal case constituted a divulgence of such messages contrary to the express terms of the statute. In *Weiss v. United States*, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298, intrastate telephone communications were intercepted by federal agents, and their contents were repeated to certain of the defendants. As a result these defendants confessed and testified for the government. The court decided that the statute prohibits the divulgence of intrastate as well as interstate messages. It further held that the witnesses' testimony concern-

ing the contents of the messages was not an authorization by them, as the senders of the messages, within the contemplation of the statute.

*Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307, is another case in which the same statute was considered. Reversing a judgment of conviction, the court held that testimony induced as a result of unlawful interception and use of the telephone messages was inadmissible, and the introduction of the evidence so obtained, over the objections of the defendants, who were the senders, constituted a violation of the purpose and policy of the statute. *Goldstein v. United States*, 316 U.S. 114, 62 S.Ct. 1000, 1004, 86 L.Ed. 1312, was presented upon a record similar to that in the second *Nardone* case, but the defendants were not parties to the communications used to induce two co-conspirators to become prosecution witnesses. The question for decision, said the court, was whether it should extend the sanction for violation of the Communications Act so as to make available to one not a party to the intercepted communication the objection that such use outside the courtroom, and prior to the trial, induced evidence which would otherwise be admissible. No court has ever gone so far, it observed, in applying the implied sanction for violation of the Fourth Amendment to the federal Constitution and, on the contrary, " \* \* \* the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized." For that reason, it was held, no broader sanction should be imposed for a violation of the Communications Act, *supra*. And as a divulgence of the intercepted messages may lawfully be made with the consent of the sender, none but he was intended to be protected. Therefore, although the prosecuting officers violated the statute in using the messages to induce the parties to them to testify, the testimony was admissible against one not a party to the intercepted communication.

[3,4] Under these decisions of the United States Supreme Court, although intrastate messages come within the terms of the statute, the appellant in the present case is not a "sender" entitled to its protection. True, in *Goldstein v. United States*, *supra*, the court referred to *United States v. Polakoff*, 2 Cir., 112 F.2d 888,

889, 134 A.L.R. 607, where it was held that each of the persons engaging in a telephone conversation is a sender within the meaning of the Act. "Every telephone talk," said Judge Learned Hand, "like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by § 605 to hold that because one originated the call he had power to surrender the other's privilege. \* \* \* It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; both must consent to the interception of any part of the talk." But this reasoning is not applicable to the testimony of the officers who related what was said to them when they answered the telephone in the apartment where Kelley was arrested. There was no interchange of conversation in which one person referred to what the other had just said; indeed, there was no answer so far as the appellant is concerned.

[5,6] Kelley asserts that the telephone messages would be relevant only if they were intended for him. Yet assuming that the persons who called on the telephone intended their messages to reach Kelley, since he in fact was not a party to the conversations, he is in the same position as the addressee of a telegram. And Judge Hand, in the Polakoff case, stated, as being beyond reasonable dispute, that the sender of a telegram may consent to its interception "even though that prejudice the addressee." Therefore the appellant could not be a "sender" even within the broad definitions given by Judge Hand. And only the "sender" of a communication, said the United States Supreme Court, is entitled to the protection of the statute.

[7-9] Other points presented by the appellant concerning the admission of evidence include his assertion that the court erred in allowing the police officer to explain the meaning of the term "insured" in one of the telephone messages and in testifying that Bay Meadows and Keeneland were race tracks operating in the United States on the day of the appellant's arrest. His contention in this regard is supported by *People v. Davis*, 47 Cal. App.2d 331, 117 P.2d 917. There, as in the present action, a witness testified that, for a considerable period of time, he had investigated bookmaking establishments and was familiar with the manner in which bookmaking commonly was conducted in

the community; also, that he had testified in court concerning the interpretation of bookmaking signs and symbols on numerous occasions. But assuming that the admission of the evidence against Kelley was erroneous, the error was not prejudicial. Since the conversations received by the officers after reconnecting the telephone were properly admissible to prove the use of the occupied premises (*People v. Joffe*, 45 Cal.App.2d 233, 113 P.2d 901; *People v. Reifensuhl*, 37 Cal.App.2d 402, 99 P.2d 564), the messages received by the officer, excluding the terms which he explained, amply support the verdict of the jury.

[10,11] The testimony of the officer that racing bulletins named the horses mentioned in the telephone conversations as entrants in races run on the day Kelley's apartment was entered was erroneously admitted, the appellant argues. Being hearsay, no inference could legally be drawn from it concerning races run on that day. But again the error is harmless, since it is immaterial whether the races were run. *People v. Hinkle*, 64 Cal.App. 375, 221 P. 693; *People v. Carroll*, 54 Cal.App. 684, 202 P. 885. The corpus delicti of the crime charged is established by proof that the appellant occupied a room with bookmaking paraphernalia for the purpose of recording or registering bets upon horse races. Pen.Code Sec. 337a (2).

The order is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice.

I dissent. The majority opinion misconstrues the provisions of the Federal Communications Act, and the authorities upon which it relies in support of its interpretation of said act clearly hold that evidence of the character here involved is inadmissible because obtained in violation of the provisions of said act.

The defendant was convicted of occupying an apartment for the purpose of bookmaking upon evidence received in violation of the Federal Communications Act (47 U.S.C.A. § 605). Police officers were admitted to the apartment occupied by defendant. The telephone in the apartment rang many times while the officers were there. Evidence was admitted showing that while the defendant was seated about eight feet from the telephone the officers



answered the telephone on many occasions when it rang. On one of such occasions the voice on the phone inquired if it was Jimmy, to which the officer replied, "Yes." On other occasions the communicants stated wagers they desired to make.

The Federal Communications Act provides: "*\* \* \** and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto \* \* \*." (Emphasis added.) (47 U.S.C.A. § 605.)

At the outset it should be observed that the rule with reference to the admissibility of evidence obtained in violation of the constitutional prohibition against unlawful searches and seizures considered in *People v. Gonzales*, 20 Cal.2d 165, 124 P.2d 44, is not here involved. That constitutional guarantee does not make it a crime to give testimony obtained in violation thereof. The chief basis of such evidence not being admissible is to prevent a violation of that constitutional guarantee; if such evidence is admissible it would encourage violations. However, under the Federal Communications Act it is made a crime and punishable as such to divulge or suffer to be divulged the information obtained in violation of the act. Section 501 reads: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such

offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than \$10,000 or by imprisonment for a term of not more than two years, or both." (47 U.S.C.A. § 501.) The giving of evidence as to the nature and substance of a communication obtained contrary to the act would be a divulgence thereof and would be a crime committed in the actual presence of the court at the trial, a situation that should not be tolerated under any circumstances.

The question is, therefore, whether section 605 was violated in the instant case. The majority opinion, holding that there was no violation, is based upon two propositions (consideration to which will be hereinafter given); that is, that the act was only for the protection of the sender and that there was no interception of the telephone message. But even if those propositions are accepted there still remains the second separate and independent clause in the foregoing quotation from section 605 which declares unlawful the receipt and use by a person not entitled thereto of a communication. Repeating, that clause reads: "*\* \* \** no person not being entitled thereto *shall receive* \* \* \* any communication \* \* \* and use the same \* \* \* for the benefit of another not entitled thereto; \* \* \*." Hence, the intended *recipient* of the communication is protected against unauthorized persons receiving his message. It thus becomes immaterial whether the sender only is protected by the preceding clause appearing in the section as heretofore quoted or whether there has been an interception within the meaning of that clause, because the clause here in question unequivocally protects the recipient of the message and interception is not required, if that term be limited to mean listening to the message before it reaches the mouthpiece of the receiving telephone as held in the majority opinion. The wording of the clause now discussed clearly applies to the facts in the instant case. The officers *received* the messages over the telephone. They were not entitled to do so under the Federal Communications Act, the message being intended for defendant. Defendant did not authorize them to receive it. The message was *used* by the officers when they testified at the trial. They *used* it for the benefit of another, namely, the State. The State was not entitled to it. Therefore, the giving of

the testimony at the trial constituted a crime.

The statement apparently contrary to the foregoing views in *Sablowsky v. United States*, 3 Cir., 101 F.2d 183, 186, was made merely in passing. It was there said that the clause in question "obviously refers again to employees of communication agencies." It does not necessarily exclude the possibility that other persons may be included.

It has been held that all of the clauses in section 605 apply to communications in intrastate as well as interstate commerce (*Weiss v. United States*, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298); therefore, the clause here discussed applies in the instant case. The case of *Goldstein v. United States*, 316 U.S. 114, 62 S.Ct. 1000, 86 L. Ed. 1312, expressly reserves for future determination the question of the scope of the clause above discussed.

If it be assumed that the clause heretofore discussed is not applicable to the instant case, the first clause appearing in the above-quoted portion of section 605 is clearly available. It is there provided that no person not authorized by the sender shall divulge a telephonic communication. The United States Supreme Court has stated in *Goldstein v. United States*, supra, that the clause is designed only for the protection of the sender, but that statement is dictum inasmuch as in that case defendant was neither the sender nor the recipient of the message; he was not a party to it. The court stated the question involved at page 1004 of 62 S.Ct.: "The question now to be decided is whether we shall extend the sanction for violation of the Communications Act so as to make available to one *not a party* to the intercepted communication the objection that its use outside the courtroom, and prior to the trial, induced evidence which, except for that use, would be admissible." (Emphasis added.) And in conclusion at the same page: "We are of the opinion that even though the use made of the communications by the prosecuting officers to induce the parties to them to testify were held a violation of the statute, this would not render the testimony so procured inadmissible against a person *not a party to the message*. This is the settled common law rule. There was no use at the trial of the intercepted communications, or of any information they contained as such. If such use as occurred here is a

violation of the Act, the statute itself imposes a sanction." (Emphasis added.) In the case at bar the defendant was a party to the conversation and invokes the statute. True, the officers rather than defendant answered the telephone, but the communication was intended for him and he was the only party entitled thereto. The presence of the officers prevented him from receiving the message. If it were not intended for him as the occupant of the apartment, the evidence would be of no value or aid on the issue of defendant's guilt. Furthermore, the *Goldstein* case cites with approval *United States v. Polakoff*, 2 Cir., 112 F.2d 888, 889, where it is said: "The word, 'sender', in § 605 is less apt for a telephone talk than for a telegram, as applied to which there can be no doubt of its meaning. If a man sends a telegram, he may consent to its interception even though that prejudice the addressee, as conceivably it might; but if the addressee answers by telegram, he alone can give a valid consent to the interception of the answer. He has a privilege like the sender, which is as immune from surrender by the sender's consent, as the sender's privilege as to the first message was from surrender by his consent. So far there can be no reasonable dispute. *Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by § 605 to hold that because one party originated the call he had power to surrender the other's privilege.* There cannot be the least doubt of this as to the answers of the party called up; and while it might indeed be pedantically argued that each party had the power to consent to the interception of at least so much as he said, that would be extremely unreal, for in the interchange each answer may, and often does, imply by reference some part of that to which it responds. It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; both must consent to the interception of any part of the talk." (Emphasis added.) While it is true in the instant case that there were no answers by defendant inasmuch as the officers answered the telephone calls, he was the intended recipient and the calls would have no relevancy unless they were intended for him as an occupant of the apartment.

It is equally clear that the message was intercepted by the officers. It is fantastic



to argue that there is no interception where the communication has reached the receiving telephone. It had not completed its course until it reached defendant, the person for whom it was intended. If the officers had not answered the calls, defendant presumably would have done so. It may not be said with any realism that tapping a wire 1/100 of an inch before it reaches the telephone receiver is an interception, but actually listening to the conversation on the receiver without the consent of the intended recipient is not. The language in *United States v. Gruber*, 2 Cir., 123 F.2d 307, 309, is pertinent: "A hearer not contemplated by the parties to the conversation was introduced without their consent. It can make no difference that the person divulging did not know the contents of the message. Whether he was never engaged in listening or could not understand the communication, so long as he caused it to be transmitted to a third party without the consent of the sender, he intercepted and divulged the communication and violated the statute as surely as though *he had abstracted a telegram from a Western Union Office and delivered it to some third party.*" (Emphasis added.) In the instant case the officers abstracted the communication from the receiver and divulged it in court.

The view that the officers intercepted the communication in the instant case is borne out by *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322. Although it was there held that the act did not extend to an eavesdropper listening to the one sending the message, the court, in discussing the meaning of the term interception, said at page 995 of 62 S.Ct.: "It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the *intended receiver*. The listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room." (Emphasis added.) Here the message had not come into the possession of defendant, the in-

tended receiver. It was intercepted by the officers. The act of the officers was an interference with the instrumentality, the telephone receiver, in using it to receive a message to which they were not entitled. In the *Goldman* case there was no such interference with the instrumentality, the telephone receiver, in using it to receive a message to which they were not entitled. In the *Goldman* case there was no such interference with the instrumentality, and the eavesdropping perpetuated therein did not constitute a violation of the Federal Communications Act.

We are not here concerned with the legislative policy which prompted the enactment of the Federal Communications Act, but only with its interpretation as applied to the facts of this case. In my opinion, the construction placed on the quoted provisions of the act by the majority opinion is clearly contrary not only to the plain and unambiguous language contained in the act as interpreted by the decisions of the Supreme Court of the United States, but also the object and purpose to be accomplished thereby. It is not a sufficient answer to say that the act was not intended to protect persons against prosecution who are engaged in unlawful pursuits, as Congress could have provided an exception in those cases if it had been disposed to do so.

The obvious purpose in adopting the statute was to guarantee protection to persons sending and receiving communications against meddlers, snoopers and inquisitors, regardless of the motive or purpose of those seeking to intercept communications intended for another. To say that the act does not apply to the factual situation in the case at bar is to ignore the plain language in the act and place a strained construction upon the statute as a whole.

In my opinion, the evidence relating to telephonic communications was clearly inadmissible, and the judgment should therefore be reversed.

PETERS, J., concurred.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

22 Cal.2d 87

**BURLINGHAM et al. v. GRAY et al.**  
**L. A. 18582.**

Supreme Court of California.

April 30, 1943.

**1. Appeal and error ⇨395, 773(2)**

Where appealing defendants after due notice to them, failed to pay required filing fee on appeal, and filed no briefs or points and authorities, appeals would be dismissed. Rules of the Supreme Court and District Courts of Appeal, rule 5.

**2. Trial ⇨142**

Court may direct verdict only when, disregarding conflicting evidence, giving plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn therefrom, result is a determination that there is no evidence of sufficient substantiality to support verdict for plaintiff.

**3. Appeal and error ⇨1170(8)**

Where evidence was ample to sustain verdict for plaintiffs, trial court's direction of verdict for defendant resulted in "miscarriage of justice" authorizing reversal by Supreme Court. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

**4. Master and servant ⇨318(1)**

An "independent contractor" is one who renders service in course of independent employment or occupation, following employer's desires only in results of work, and not in the means whereby it is to be accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

**5. Master and servant ⇨301(1)**

Relationship of "master and servant" or "employer and employee" exists whenever employer retains right to direct how work shall be done as well as result to be accomplished, but right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee" and "Master and Servant".

**6. Master and servant ⇨318(1)**

Employer's right to control, rather than amount of control which is exercised, is determinative factor in passing on question whether relationship of "independent contractor" or that of "employer and employee" or "master and servant" exists.

**7. Master and servant ⇨301(1)**

One means of ascertaining whether employer's right to control exists so as to give rise to relationship of "employer and employee" is to determine whether, if instructions were given, they would have to be obeyed.

**8. Master and servant ⇨301(1)**

Real test in determining whether relationship of "employer and employee" exists is whether alleged employee is subject to employer's orders and control and is liable to be discharged for disobedience or misconduct, and fact that certain amount of freedom of action is inherent in nature of work does not change character of employment if employer has general supervision and control.

**9. Master and servant ⇨301(1)**

No single circumstance is more conclusive to show relationship of "employer and employee" than employer's right to end service whenever employer sees fit to do so.

**10. Master and servant ⇨301(1)**

Fact that alleged employee chooses his own time to go out and return and is not directed where to go or to whom to sell, is not conclusive of relationship with employer and is not inconsistent with relationship of "employer and employee".

**11. Master and servant ⇨316(1)**

Manner of payment of alleged employee by employer is not a decisive test of question whether relationship of employer and employee or of independent contractor exists.

**12. Master and servant ⇨332(3)**

Where there is shown no express agreement as to right of employer to control manner of doing of work by alleged employee, existence or nonexistence of right must be determined by reasonable inferences drawn from circumstances shown, and is a question for jury, and only where there is but one inference reasonably to be drawn from evidence does question whether one is an employee or independent con-

tractor become a "question of law" for court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

### 13. Automobiles $\S$ 245(32)

Where newspaper company contracted with news dealer requiring dealer to sell newspapers at fixed prices, and giving company right to cancel contract at any time, and dealer complied with suggestions of company's road man as to time and manner of delivery of newspapers by sub-agents and circulation contests for sub-agents, and was given two weeks vacation with pay each year and was permitted to subscribe to company's hospitalization plan for employees, whether there was created relationship of "independent contractor" precluding recovery from company for death caused by sub-dealer's negligent operation of automobile, or relationship of "employer and employee" between company and dealer and sub-dealer was for jury.

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#### In Bank.

Appeals from Superior Court, Orange County; George K. Scovel, Judge.

Action by Winifred E. Burlingham and others against the Stockholders Publishing Company, John W. Gray and others to recover for the wrongful death of Wade Earl Burlingham, deceased, from injuries sustained in collision of an automobile driven by John W. Gray and a motorcycle operated by the deceased. From a judgment entered on a directed verdict in favor of the Stockholders Publishing Company, the plaintiffs appeal. From a judgment in favor of the plaintiff as against John W. Gray and others, John W. Gray and others appeal.

Appeals of John W. Gray and others dismissed. Judgment for Stockholders Publishing Company reversed.

Prior opinion, 129 P.2d 757.

Dorothy Thompson and Raymond Thompson, both of Fullerton, for appellants.

Blodget & Tobias, of Santa Ana, for respondents.

SCHAUER, Justice.

This is an action for damages for the wrongful death of Wade Earl Burling-

ham, caused by injuries sustained in the collision of an automobile driven by the defendant John W. Gray and a motorcycle operated by the decedent. The sole question to be determined is whether the trial court was or was not justified in holding that as a matter of law under the evidence the defendant John W. Gray was not an employee of defendant Stockholders Publishing Company on the date of the collision and in withdrawing that issue from the jury. We have concluded that the question should have gone to the jury.

[1] The case comes to us on appeal by plaintiffs from the judgment entered upon a directed verdict against them and in favor of defendant Stockholders Publishing Company. Defendants John W. Gray, Lewis R. Gray, Alice D. Gray, and Stanley C. Porter filed separate notices of appeal from a judgment on a verdict found by the jury against them and in favor of plaintiffs. The appealing defendants, however, after due notice to them, have failed to pay the required filing fee on appeal, and have filed no briefs or points and authorities; therefore their incipient appeals will be dismissed (see rule 5 of Rules of the Supreme Court and District Courts of Appeal).

Plaintiff Winifred E. Burlingham is the widow and the other plaintiffs are the parents of the decedent Wade Earl Burlingham. At the date of the collision, January 1, 1941, John W. Gray (the driver of the automobile) was nineteen years of age. Defendants Lewis R. Gray and Alice D. Gray are the parents of John, and are sued as signers of the application for his operator's license. Defendants Stanley C. Porter and Stockholders Publishing Company are alleged in the complaint (amended) to have been the employers of John W. Gray in the business upon which the latter was engaged at the time of the accident. Evidence as to the fault of the two persons involved in the collision has been omitted from the transcript by stipulation, and, as previously mentioned, the only issue before us is the sufficiency of the evidence as to the character of the relationship between the defendant Stockholders Publishing Company on the one hand and Porter and Gray on the other.

The evidence shows that at the date of the accident the defendant Stockholders Publishing Company (hereinafter referred to as "the company") was the publisher,



and defendant Porter a distributor (in a portion of Orange County) of a newspaper known as "The News". Defendant John W. Gray was one of the carrier boys employed by Porter to deliver copies of The News in the latter's territory, and was paid by Porter therefor the sum of \$50 per month, "plus bonuses if his circulation went up." A written contract between Porter and the company, dated November 15, 1937, contains the following provisions, among others:

"\* \* \* the Dealer [Porter] \* \* \* agrees:

"Section 1.

"What the Dealer Will Do

"1. To use his earnest and conscientious effort to promote the circulation of \* \* \* [The News] by frequent and thorough canvasses among the inhabitants of his district, and by frequent distribution and display of such advertising matter concerning \* \* \* [The News] as may from time to time be sent to the Dealer by the Company.

"2. To sell \* \* \* [The News] to regular subscribers and to transient buyers of his district at prices fixed by the Company, the Dealer's profit to consist of the difference between the retail price of said newspapers fixed by the Company and the wholesale price thereof also fixed by the Company.

"3. To sell copies \* \* \* to sub-newsdealers, distributors and circulators at prices fixed by the Company, the Dealer's profit to consist of the difference between the wholesale rate at which copies of said newspaper are sold to him and the rate fixed by the Company for sale of such copies to sub-newsdealers, distributors and circulators.

"4. To pay his bills promptly on or before the tenth (10th) day of each month for all papers furnished to the Dealer by the Company during the preceding month, regardless of whether or not the Dealer may have collected the amounts due from subscribers, sub-newsdealers, distributors, circulators and all others for such newspapers, and to assume no credit for unsold copies or make any deductions whatsoever without the written consent of the Company.

"5. To pay promptly all bills for supplies, prizes or other merchandise, common-

ly used in connection with circulation methods, furnished by the Company to him.

"6. To furnish a bond or security satisfactory to the Company in such sum as may be designated by the Company to secure the payment of all sums that may be due to the Company from Dealer hereunder, and also at the option of the Company.

"7. To maintain an accurate and up-to-date list of subscribers and their addresses, and to furnish such list to the Company or its representative, at its request, and to no other person, firm or corporation without the written consent of the Company.

"8. To act as dealer \* \* \* within the territory as assigned to him by the Company, and to be responsible for his own acts and of his substitutes and subordinates during the life of this agreement. <sup>1</sup> *The Dealer hereby declares that he is engaged in an independent business, and that he personally hires and pays all persons assisting him in the distribution of said newspapers and in the collection of all money therefor in the district aforesaid, and has sole and exclusive control over his said employees. The Dealer hereby agrees that the Company shall not in any event be liable for any loss, damage or injury to the person or property of the Dealer, or to the person or property of any of his employees, or to the person or property of any of the public, and the Dealer does hereby indemnify and save the Company harmless from any and all damage or liability whatever for or on account of any such loss, damage or injury.*

"9. It is understood that a bonus of any amount paid by the Company to the Dealer may be adjusted as the Company sees fit, \* \* \*.

"Section 2

"What the Dealer Will Not Do

"1. Not to permit any third person \* \* \* to stamp any advertising matter on copies of \* \* \* [The News] before delivery to subscribers, \* \* \* or others, and not to permit the insertion of circulars or other advertising matter for distribution with \* \* \* [The News] excepting those which are sent to the Dealer by the Company.

"2. Not to assign or transfer this agreement or any rights thereunder or any

interest therein. Any attempted assignment hereof shall give the Company the right to terminate this agreement.

"\* \* \* the Company \* \* \* agrees:

### "Section 3

#### "What the Company will Do

"1. To furnish the Dealer with copies of \* \* \* [The News] at prevailing wholesale prices fixed by the Company, subject to the provisions of paragraph 1 of Section 4 hereof.

"\* \* \* it is further agreed and understood \* \* \*:

### "Section 4

#### "How the Company May Terminate this Agreement

"1. That the Company may without notice and when necessary suspend this agreement in case of \* \* \* change in the retail or wholesale prices of \* \* \* [The News]; or may, at any time for violation by the Dealer of any part of this agreement; or *may cancel this agreement at any time, if in the opinion of the Company the Dealer is incapable or unsatisfactory in any manner*, or is responsible through neglect or inattention to business of causing the Company's circulation in said district to decrease. \* \* \*

### "Section 5

#### "How the Dealer May Terminate this Agreement

"1. The Dealer may withdraw from this agreement, provided he does each and all of the following:

"(a) Gives the Company at least thirty (30) days' notice in writing of his intention to withdraw; (b) Furnishes the Company with a complete list of subscribers' names, dates to which subscriptions are paid, addresses and places of delivery of \* \* \* [The News], and (c) pays the Company in full for all newspapers theretofore supplied to him, and turns in to the company all money collected in advance from subscribers.

*"It is mutually understood and agreed that the Company may suspend, terminate or cancel this agreement at any time without notice to the Dealer, for any of the reasons or causes or upon any of the grounds mentioned and referred to in paragraph 1 of Section 4 hereof. \* \* \**"

Under what counsel for each of the respective parties states to be a separate oral agreement between Porter and the com-

pany, Porter was paid \$2 per week (less social security deductions) by means of a regular payroll check of the company, for picking up a bundle of papers at Anaheim and taking it to Orange to the Orange agent. At the time of the accident defendant John W. Gray was engaged in delivering copies of The News to subscribers and was also carrying and "on his way to deliver" the extra bundle of papers.

Plaintiffs' contentions are four:

1. The written contract in the instant case, although similar in many respects to the contracts in the cases of Bohanon v. James McClatchy Pub. Co., 1936, 16 Cal. App.2d 188, 60 P.2d 510, and Batt v. San Diego Sun Pub. Co., Ltd., 1937, 21 Cal. App.2d 429, 69 P.2d 216, nevertheless contains some provisions which show that the company had "the power to control the means of obtaining the result," and therefore was the employer of Porter and Gray.

2. Although "The written contract between Porter and the Publishing Company is drawn with the evident purpose of creating the appearance [and, doubtless, the actuality] of an independent contractor relationship," nevertheless, under doctrine declared in Luckie v. Diamond Coal Co. (1919), 41 Cal.App. 468, 478, 183 P. 178 (see, also, Brown v. Industrial Acc. Comm. (1917), 174 Cal. 457, 460, 163 P. 664; Stewart & Nuss v. Industrial Acc. Comm. (1942), 55 Cal.App.2d 501, 506, 130 P.2d 985) the conduct of the parties in execution of the contract may be relied upon by persons not parties to the contract, such as plaintiffs here, as showing that the true relationship between the parties was that of employee-employer. In Luckie v. Diamond Coal Co., at page 478 of 41 Cal.App., at page 182 of 183 P., it is stated that "Strangers to [a] contract are at liberty to show that the written instrument does not disclose the full or true character of the relation between the contracting parties. \* \* \* Accordingly, it has been held that, in an action of this character, while, prima facie, the relation of the parties to a written contract of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation such contract should be considered in view, not only of the circumstances under which it was made, but of the conduct of the parties while the work is being performed. [Citation.]"

3. Regardless of Porter's status under the written contract he was an employee



of the company in transporting the extra bundle of papers from Anaheim to Orange.

4. Negligence on the part of defendant John W. Gray as Porter's "authorized assistant" under both the written and the oral contracts, renders the company liable.

[2,3] A court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. (In re Estate of Lances (1932), 216 Cal. 397, 400, 14 P.2d 768; In re Estate of Flood (1933), 217 Cal. 763, 768, 21 P.2d 579; Curcic v. Nelson Display Co. (1937), 19 Cal.App.2d 46, 49, 50, 64 P.2d 1153.) We are of the opinion that the evidence is ample to sustain a verdict in favor of plaintiffs and that it was error resulting in a miscarriage of justice (Calif. Const., art. VI, § 4½) for the trial court to direct a verdict in favor of the company.

[4-6] In a recent case (S. A. Gerrard Co. v. Industrial Acc. Comm. (1941), 17 Cal.2d 411, 413, 110 P.2d 377, 378) this court had occasion to distinguish the relationship of an independent contractor from that of an employee, to the employer. It said, speaking through Mr. Justice Edmonds: "An independent contractor is 'one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not the means whereby it is to be accomplished.' [Citations.] On the other hand, the relationship of master and servant or employer and employee exists whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished. [Citations.] But this rule requires that the right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown. [Citations.] Also, the right to control, rather than the amount of control which was exercised, is the determinative factor." And with reference to the subordinate in that case, the court aptly said (at page 414 of 17 Cal.2d, at page 378 of 110 P.2d): "In form he was an independent contractor; in effect he was an employee. \* \* \*" Hence it becomes necessary to carry our scrutiny beyond the form of the contract between the publishing company and Porter.

Porter testified that at the time he took over the agency for The News he was told by the representative or "road man" of the company that he (Porter) "would be responsible for Santa Ana, and the growth of the circulation in that territory," and that "the papers should be delivered by 6:00 o'clock in the evening, and the best service possible," meaning "porch service," should be given; that thereafter the road man called upon him three or four times a year, generally asking "if I have any idea as to building up the circulation, and how we are getting along"; that "at times he [the road man] has contests in circular form, and he either mails them out to me, or brings them down personally and tells me to have the boys work on contests such as Catalina trips and trips to get subscriptions"; that the prizes for such contests were presented by the company to the carriers; *that the witness had never declined to carry out the suggested contests*; that at other times the company had furnished him with metal newsstands for the papers and suggested that he put them on the street corners, *which he did*; that the company told him "to put papers in the window" *and he did so*; that the company sometimes gave him sample copies of The News which he was to deliver free for a time, and *he always complied with their suggestions* in this respect; that occasionally he had been told he could "take my carriers out in soliciting crews from door to door and canvass prospects," and on such occasions *he always did so*; that on other occasions the company had sent a crew of solicitors to the witness' house and he was "instructed to give them territories to work which would benefit both myself and The News to the best extent," *which he did*; that such solicitors were paid by the company and their pay was not charged to the witness; that at the suggestion of the circulation manager he attended meetings at the Los Angeles office, and at the last meeting "we were told there would be an insurance policy to be sold along with The News, and our co-operation would be appreciated in building business, both the circulation and the insurance policy and the paper"; that *he complied with that request*; that the company told him to give good service and early service, and suggested that he get all of the papers delivered before 6 in the evening and before 7 in the morning; that he "had" to buy his receipt and collection forms from the company; that pursuant to written in-

structions from the company he had "to keep my own records, my own books, and twice a year I have to turn in a list and addresses of all the subscribers in my territory, in books that are furnished by The News"; that he divided his territory into such carrier routes as he saw fit, and made changes from time to time at his own "convenience," merely keeping the company informed of his actions in this regard; that as the "result" of "conversation" he had had with company representatives and of "the union contract" he was allowed a two weeks' vacation "with pay"; that the company furnished a substitute for Porter during the latter's vacation period and paid such substitute "\$35.00 or \$37.50 each week"; that Porter's "earnings" including the \$2 check continued during his vacation; that he could take longer than two weeks if he asked to do so, but the company would pay a substitute for only two weeks; that he had no right to sell his agency for The News; that "When I took over the Anaheim agency, the Anaheim agent had tried to sell it to me, and I got in touch with the road man, and he said 'Well, they aren't for sale, that The News replaces the man,' and it was given to me for a cash buy," the cash being paid to The News; that he was told at that time it "would be the same situation" when he disposed of his route; that he purchased the newspapers from the company at a *price fixed by the company* and resold them to his carrier boys at a profit; that the company *also fixed the retail price* paid by subscribers, although the witness could charge the carriers whatever price he wished; that in addition to his compensation from the purchase and sale of newspapers, he received each week from the company its regular payroll check in the sum of \$1.96, representing the payment of \$2 less social security deductions, for "picking up [a] bundle [of newspapers] at Anaheim, and taking it to the Orange agent, re-spotting it for the Orange agent"; that such payroll check had "nothing to do with the purchase and sale of the newspapers that are covered by the written contract"; that he could select his own method of delivery of the bundle to Orange and that he delivered it or had some one else do so.

Porter also testified that the road man had given him a booklet entitled "Announcing a New Group Hospitalization and Surgical Plan for Employees of The News, Los Angeles, California," together with an ap-

plication to participate in such plan "all ready for me to sign"; that Porter "took it out the day it was given to me," and since then had "paid premiums on the plan." The booklet announcing the plan was addressed "To Our Employees:" and stated, among other things, that "Stockholders Publishing Co., Inc., has completed arrangements with \* \* \* [a named insurance company] to provide group hospitalization and surgical insurance for the benefit of its employees. As in the case of group insurance, Stockholders Publishing Co., Inc. has agreed to pay a substantial portion of the premium. This insurance will be available to all full time employees whose names appear on the company's payroll, regardless of age or sex, and without medical examination, at a cost to the employee of only 23c per week."

While Porter was on the witness stand, plaintiffs' counsel showed him a copy of an instrument entitled "Contract, Los Angeles Newspaper Guild and The News of Los Angeles." Porter testified that this copy had been mailed to him by the Los Angeles Newspaper Guild, but that he had never seen the original contract. Demand that the original be produced was then made by plaintiffs' counsel upon counsel for the company. The latter said that he had no such contract, and the court stated it was "too late" to issue "a notice to produce, or a subpoena duces tecum on the company." No further proceedings were taken toward production of the original of the purported contract. Porter, however, testified that he received through the mail, from The News, "a paper marked 'Designation of Beneficiary'" together with "either two or three other copies, and I was to sign the other two or three and mail one and keep this copy for myself"; that he mailed the duplicate back to The News. The "Designation of Beneficiary" provides, among other things, that: "The undersigned, an employee of Stockholders Publishing Company, Inc., in accordance with Section 14, Subdivision 4 of that certain contract dated the 30th day of September, 1940, between Stockholders Publishing Company, Inc., (hereinafter referred to as the 'Employer') and the Los Angeles Newspaper Guild (hereinafter referred to as the 'Guild'), hereby designates \* \* \* [beneficiary named] as beneficiary of the undersigned, to receive and accept such sum or sums of money as may be due or may become due to the undersigned, under the terms of said

contract \* \* \* and is signed "Stanley C. Porter, Employee."

Porter testified further that he employed fifteen to twenty "assistants" or carriers in the work of distributing The News; that the company knew of such fact, and that at the close of each month he was required by the company to turn in an "earnings report" showing the carriers that had worked for him during the past month; that he had informed the company that he was not carrying the package to Orange himself; that John W. Gray had gone to work as a carrier about December 1, 1940; that the previous week Gray had applied for a route and Porter had told him "the direction of the route, the territory where the route lay," and had asked him "how he would be able to do the work" inasmuch as the route was fifty miles long, and Gray "said he had a car"; that Porter told Gray "the duties of the route" and that "as long as he fulfilled those duties, that the job would be his, and if he fell down on them, why I would have to replace him"; that Gray's predecessor on the route showed Gray the route; that Porter had had no occasion to give Gray further instructions; that he told Gray "he would receive a guarantee of \$50, and if he built his route up over 160 papers, he would receive ten cents per subscriber additional, and ten per cent if he did the collecting"; that at the time of the accident here involved Gray was on his way to deliver the bundle to Orange, and after the accident Porter got the bundle from Gray's wrecked car and delivered it himself.

John W. Gray testified that Porter had arranged for him (Gray) to take over a carrier route; that Porter told him the general route and when to go to work and that he was to go to Anaheim and pick up the papers, and "told me where they would be left, and he said they would all be for Santa Ana except one bundle which I was to deliver at Orange, and he told me where to leave them in Garden Grove and various places of that nature, in the racks"; that he had no instruction as to when to complete work each day or as to how to deliver the bundle to Orange, except that he was to "take it and leave it at a certain place \* \* \* by a certain time"; that he provided his own transportation; that he was not told that he could not have some one else deliver the papers for him; that the only other person with whom he discussed the work was the former carrier, who showed him the route; that written

instructions were sent to him by the Los Angeles office of the company, enclosed in envelopes attached to the bundles for the subscribers and stating "which ones wanted to stop, and things of that nature"; that at times the witness "got mail for Mr. Porter in that way and I was to leave it at his place"; that Porter told him "when I knew the various territories, he told me to take the subscriptions and the kicks out of the envelope and leave them in Santa Ana for the various carriers of the papers" and that he (Gray) kept those which were for his own route.

Upon this evidence the trial court left to the jury the question of the relationship existing between Porter and Gray, i.e., whether Gray was Porter's employee or was an independent contractor, but ruled that as a matter of law Porter was an independent contractor in all his dealings with the company and that Gray had no employment relationship with the company.

[7-11] As indicated in *S. A. Gerrard Co. v. Industrial Acc. Comm.*, supra (1941), 17 Cal.2d 411, 413, 110 P.2d 377, the determination of whether the status of an employee or of an independent contractor exists is governed primarily by the right of control which rests in the employer, rather than by his actual exercise of control. (See, also, *Robinson v. George* (1940), 16 Cal.2d 238, 244, 105 P.2d 914; *Press Pub. Co. v. Industrial Acc. Comm.* (1922), 190 Cal. 114, 121, 210 P. 820; *Fischer v. Havelock* (1933), 134 Cal.App. 584, 588, 25 P.2d 864; *Bohanon v. James McClatchy Pub. Co.* supra (1936), 16 Cal. App.2d 188, 196, 60 P.2d 510; *Phillips v. Larrabee* (1939), 32 Cal.App.2d 720, 725, 90 P.2d 820.) However, "the right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown." (*S. A. Gerrard Co. v. Industrial Acc. Comm.*, supra (1941), 17 Cal.2d 411, 414, 110 P.2d 377, 378; *Moody v. Industrial Acc. Comm.* (1928), 204 Cal. 668, 670, 671, 269 P. 542, 60 A.L.R. 299; *State Comp. Ins. Fund v. Industrial Acc. Comm.* (1941), 46 Cal.App.2d 526, 529, 116 P.2d 173.) "One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed." (*Press Pub. Co. v. Industrial Acc. Comm.*, supra [190 Cal. 114, 210 P. 823]). The real test has been said to be "whether the employé was subject to the employer's or-



ders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it." (May v. Farrell (1928), 94 Cal.App. 703, 710, 271 P. 789, 793; Curcic v. Nelson Display Co., supra (1937), 19 Cal.App.2d 46, 50, 64 P.2d 1153; see Ryan v. Farrell (1929), 208 Cal. 200, 203, 280 P. 945; Cameron v. Pillsbury (1916), 173 Cal. 83, 85, 86, 159 P. 149; George v. Chaplin (1929), 99 Cal.App. 709, 712, 279 P. 485.) "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." (Press Pub. Co. v. Industrial Acc. Comm., supra (1922), 190 Cal. 114, 120, 210 P. 820, 823; Chapman v. Edwards (1933), 133 Cal.App. 72, 77, 24 P.2d 211; see Yucaipa Farmers, etc., Ass'n v. Industrial Acc. Comm. (1942), 55 Cal.App. 2d 234, 237, 130 P.2d 146.) The fact that the employee chooses his own time to go out and return and is not directed where to go or to whom to sell is not conclusive of the relationship and is not inconsistent with the relation of employer and employee, nor is the manner of payment a decisive test of the question. (Easton v. Industrial Acc. Comm. (1917), 34 Cal.App. 321, 328, 167 P. 288; May v. Farrell, supra; Curcic v. Nelson Display Co., supra; see Cameron v. Pillsbury, supra; Phillips v. Larrabee, supra (1939), 32 Cal. App.2d 720, 726, 90 P.2d 820.)

[12] Where there is shown no express agreement as to the right of the claimed employer to control the mode and manner of doing the work, the existence or non-existence of the right must be determined by reasonable inferences drawn from the circumstances shown, and is a question for the jury. Press Pub. Co. v. Industrial Acc. Comm., supra; May v. Farrell, supra; George v. Chaplin, supra, and see Yucaipa Farmers, etc., Ass'n v. Industrial Acc. Comm., supra. It is only where but one inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court. Chapman v. Edwards, supra (1933), 133 Cal.App. 72, 79, 24 P.2d 211.

[13] Applying these tests to the evidence here, it is apparent that the question

of the relationship which the company bore to Porter and Gray, as well as the relationship between Porter and Gray, should have gone to the jury. The only specific acts which Porter testified he performed as dealer independently of suggestion or instruction from the company were the fixing of the price of the papers to the carrier boys and the division of his territory into such routes as he found "convenient"; as to all else in his relationship with the company he complied with its suggestions and instructions. If the company had seen fit to give specific instructions as to the price to be charged the carrier boys or as to fixing route divisions, it is reasonable to infer that the directions would have been obeyed implicitly. Counsel for the company state that the company did not require that Porter was to deliver his papers by automobile, by bicycle, on foot, by special messenger, or by any other specified means. However, as noted above, it is the right to control, rather than the exercise thereof, which is determinative. Aside from the right of immediate termination of Porter's agency reserved by the company under the written contract, the extensive supervision exercised by the company over Porter's activities as dealer, together with his designation as an employee under the group insurance plan and on the "Designation of Beneficiary" form, and his annual vacation "with pay," might well have served to convince the jury that the company's right of control over Porter as dealer was complete and that any instructions given to Porter would be obeyed. A finding to such effect would have ample support in the evidence.

In Bohanon v. James McClatchy Pub. Co., supra (1936), 16 Cal.App.2d 188, 199, 60 P.2d 510, 514, the broad statement is made that "It may now be regarded as settled in California that the control which has been adopted as the test by which the relationship between two persons is to be measured for the purpose of discovering whether such relationship is that of master and servant is complete or unqualified control", but the implications of such statement are qualified in the same paragraph by the much more limited declaration that "When one person is performing work in which another is beneficially interested, the latter is permitted to exercise a *certain measure of control for a definite and restricted purpose* without incurring the responsibilities or acquiring the immunities of a master, with respect to the person

controlled." In *Western Indemnity Co. v. Pillsbury* (1916), 172 Cal. 807, at page 813, 159 P. 721, at page 724, cited as authority for the broad statement above quoted from the *McClatchy Publishing Company* case, the court says: "It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires *in the results but not in the means used*. \* \* \* But in weighing the control exercised we must carefully distinguish between *authoritative* control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking." In the case now before us the contract neither expresses nor implies any limitation upon the power of the publishing company to dictate the means used as well as the results to be obtained, and the conduct of the parties to the contract, in performing it, shows that the company exercised such control in many instances and that all its "suggestions" were accorded implicit obedience by Porter. That such "suggestions" carried the sanction of authority is manifest by the provision of the contract that the company could discharge the dealer; i.e., "may cancel this agreement at any time, if *in the opinion of the Company the Dealer is \* \* \* unsatisfactory in any manner* \* \* \*." The contract sets no basis for the formation of the company's *opinion* as to what may be unsatisfactory and provides no standard by which the dealer may be judged. The right to discharge the dealer, therefore, rests not on the *quality* of his service but on the *opinion* of his employer. Even if we assume that the "opinion" could not be capriciously formed, it is apparent that if the dealer failed to carry out any "suggestion" made by the company, the latter could form an opinion that the dealer was unsatisfactory and thereupon discharge him. The very fact that the dealer had failed to "cooperate" in carrying out the "suggestion" would be evidence competent to negate any claim that the company's opinion was a mere caprice. Another fulcrum for imposing the leverage of the company's will upon the dealer exists in the contractual right of the company to fix and change both the wholesale price it charged the dealer and the retail price it required him to obtain from subscribers. Only within the ambit of practicality thus established by the company lay the "freedom" of the dealer to

fix the price he charged his carriers. In the light of the foregoing discussion, it is difficult to conceive of a much more complete control of an employee doing work of a character inherently embodying some freedom of action than that which the company had the power to exercise over the dealer Porter. The case of *Batt v. San Diego Sun Pub. Co., Ltd.*, supra (1937), 21 Cal.App.2d 429, 69 P.2d 216, relies upon the decision in the *McClatchy* case and adds nothing material to our consideration.

Counsel for the company have cited to us the case of *Rathbun v. Payne* (1937), 21 Cal.App.2d 49, 68 P.2d 291, as establishing that the inclusion of Porter as an "employee" on the blanket insurance policy does not fix his status as such. However, that case also states (at page 51 of 21 Cal.App.2d, at page 292 of 68 P.2d) that "As in other cases, the relationship must be determined from the whole situation and not from isolated facts considered as constituting the whole"; it is this principle which controls here.

The case of *State Comp. Ins. Fund v. Industrial Acc. Comm.* (1934), 2 Cal.2d 94, 39 P.2d 201, supports the conclusion that, in the transporting of the bundle of papers from Anaheim to Orange, Porter could not be said as a matter of law to have been an independent contractor. In that case a dealer, who was apparently conceded to be an independent contractor in his ordinary dealings with the newspaper publishing company from which he held an agency, was nevertheless held to be an employee of such company as to a weekly delivery for the company to another agent of an extra bundle of papers, for which the company paid the delivering agent \$1.25 for each delivery. Therefore, even if the jury should have found that Porter was an independent contractor in his dealings with the company under the written contract, it could nevertheless have justifiably concluded that it was as an employee that he received the extra payment of \$2 a week. Gray, in turn, with the knowledge of the company, was employed by Porter to make this delivery as well as to act as a general carrier.

If the jury should have determined that Porter was the employee of the company, then under the holdings of *Globe Indemnity Co. v. Industrial Acc. Comm.* (1930), 208 Cal. 715, 284 P. 661, and *Call Pub. Co. v. Industrial Acc. Comm.* (1928), 89 Cal.



App. 194, 264 P. 300, the news carrier Gray was also the company's employee (see, also, State Comp. Ins. Fund v. Industrial Acc. Comm. (1932), 216 Cal. 351, 355, 14 P.2d 306).

The judgment in favor of the defendant Stockholders Publishing Company is reversed; the appeals of the other defendants are dismissed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



22 Cal.2d 132

**KRUM et al. v. MALLOY.**

**L. A. 18546.**

**Supreme Court of California.**

**May 3, 1943.**

#### **1. Automobiles ⇨192(1)**

The liability of automobile owner for negligence in operation thereof by another depends under statute not only upon mere ownership, but upon such ownership plus permission express or implied of the owner that driver operate automobile. Vehicle Code, § 402, St.1937, p. 2353.

#### **2. Automobiles ⇨192(1)**

The power to permit use of automobile by another within statute imposing liability on automobile owner for negligent operation thereof by another with owner's permission is the correlative of the power to forbid. Vehicle Code, § 402, St.1937, p. 2353.

#### **3. Tenancy In common ⇨13, 21**

Though each owner of property in common is entitled to possess and use the whole property and possession of one co-owner is regarded as possession for all, no co-owner is entitled to a possession or usage which excludes for any period of time a like possession or usage by his co-owners.

#### **4. Tenancy In common ⇨1**

Personal property as well as real property may be owned in common.

#### **5. Automobiles ⇨192(4)**

An owner of automobile in common desiring its exclusive possession and usage for a time must have the permission, express or implied, of his co-owners to that end.

#### **6. Tenancy In common ⇨13**

Proof of co-ownership and use of personality by one co-owner, in absence of other evidence on the issue, raises rebuttable inference that such usage was lawful and with consent of absent co-owner.

#### **7. Automobiles ⇨245(26)**

Whether operation of automobile was with the consent, express or implied, of an owner not personally participating in operation, so as to render such owner liable under statute for negligent operation of the automobile, was a "question of fact" though operator was a co-owner of automobile. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

#### **8. Trial ⇨397(1)**

In action for death resulting from negligent operation of automobile owned in common by driver and defendant who was not in automobile when accident occurred, trial court erred in failing to find directly on issue whether operation of automobile was with defendant's consent, express or implied. Vehicle Code, § 402, St.1937, p. 2353.

#### **9. Trial ⇨397(1)**

Findings that automobile was owned in common by driver and defendant who was not in automobile when accident occurred and that driver was operating automobile in his own right as co-owner and not upon defendant's business did not warrant judgment relieving defendant from liability for driver's negligence in absence of finding that operation of automobile was without defendant's consent, express or implied. Vehicle Code, § 402, St.1937, p. 2353.

#### **10. Appeal and error ⇨907(3)**

Upon appeal on the judgment roll alone, Supreme Court with none of the evidence before it could not supply an omitted finding on a disputed issue of fact so as to support either the judgment rendered or a contrary judgment.

CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur L. Mundo, Judge.

Action by Marie Krum and another against Claire E. Malloy to recover for the alleged wrongful deaths of John H. Krum and Robert Marvin Krum as the result of injuries sustained in an automobile collision. From an adverse judgment, plaintiffs appeal.

Judgment reversed.

For prior opinion, see 128 P.2d 596.

Luce, Forward, Lee & Kunzel, of San Diego, for appellants.

Mills & Wood, of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiffs sue to recover damages for the alleged wrongful deaths (Code Civ.Proc. §§ 376, 377) of John H. Krum and Robert Marvin Krum, who died from injuries sustained in a collision of automobiles. The trial court found that the collision and ensuing deaths were proximately caused by negligence of Paul Malloy, who also died from injuries received in the same accident. The crux of the case as it stands before us is the question as to whether defendant Claire E. Malloy, the nineteen-year-old son of Paul, is liable by imputation, under section 402 of the Vehicle Code, St.1937, p. 2353, for Paul's (his father's) negligence. Judgment was rendered in favor of the mentioned defendant, and plaintiffs appeal on the judgment roll alone.

[1] The statute, Vehicle Code, § 402, formerly Civ.Code, § 1714<sup>1</sup>/<sub>4</sub>, provides (in material part) that "*Every owner*<sup>1</sup> of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same *with the permission*, express or implied, of *such owner*, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." Perusal of such statute discloses at once that the basic factual condition upon which it operates to impute to the owner (and thereby to *create* in him) liability for negligence of the operator is not mere ownership but is ownership plus "permission, express or implied, of such owner." The fact of permission is just as

important as is the fact of ownership. If either is absent the statute does not operate. If the statute does not operate there is no liability in the premises.

Pertinent to the controverted matter the amended complaint alleged: "VI. That at all times mentioned herein the defendants, Clair[e] Malloy and Richard Malloy, together with one Paul Malloy, were the owners of a certain Chevrolet Sedan \* \* \* and that at all times mentioned herein the said Chevrolet automobile was being driven by Paul Malloy *with the permission and consent of the said Clair[e] Malloy and Richard Malloy.*" In a separate answer defendant Claire E. Malloy joined issue on the foregoing allegation as follows: "Answering paragraph VI of said alleged first cause of action, defendant admits that Paul Malloy, mentioned in said paragraph, was the owner of the automobile therein mentioned and save and except as herein specifically admitted, defendant denies generally and specifically, each and every allegation therein contained." Such answer placed squarely at issue the averment that the offending automobile was being operated *with the permission* of the answering defendant. This was the crucial issue, as far as the matter before us at this time is concerned, but in its findings of fact the trial court failed to determine the same.

As the case is before us on the judgment roll alone we do not know the substance of the evidence which was produced on this subject, but from certain probative facts which are included in the findings it appears that some evidence pertinent to the issue was received. The principal probative fact, so established and relevant to this matter, is "that at all times mentioned in the Complaint the defendant, Claire E. Malloy, and Paul Malloy were co-owners of a certain Chevrolet Sedan [the above-mentioned automobile]." The court also found that the defendant Claire was not present in the automobile when the accident occurred and that at that time Paul Malloy was operating the car "in his own right as a co-owner and not upon the business of Claire E. Malloy." From such findings the court drew the conclusion that defendant Claire was not liable to plaintiffs for Paul's negligence.

[2-5] The finding that Claire and Paul were co-owners of the automobile is not the equivalent of a finding that Paul's opera-

<sup>1</sup> All italics within quotations are added.

tion of the car either was with, or was without, the permission of Claire. It is true that the power to permit is the correlative of the power to forbid (see *People v. Forbath*, (1935), 5 Cal.App.2d Supp. 767, 769, 42 P.2d 108), and that each owner of property in common is entitled to possess and use the whole property (*Ochoa v. McCush* (1931), 213 Cal. 426, 431, 2 P. 2d 357). It is also true that the possession of one co-owner is regarded as possession for all (*Foss v. Central Pac. R. R. Co.* (1935), 9 Cal.App.2d 117, 120, 49 P.2d 292), but none is entitled to a possession or usage which *excludes* for any period of time a like possession or usage by his co-owners (*Wood v. Henley* (1928), 88 Cal. App. 441, 452, 263 P. 870; *Johns v. Scobie* (1939), 12 Cal.2d 618, 623, 86 P.2d 820, 121 A.L.R. 1404). The cases above cited, dealing with the incidents of co-ownership, arose from cotenancies in real estate, but as cotenancy may exist in personal property as well as in real property (*Higgins v. Eva* (1928), 204 Cal. 231, 239, 267 P. 1081; *Haster v. Blair* (1940), 41 Cal.App.2d 896, 898, 107 P.2d 933) their holdings are pertinent to our discussion. A co-owner, therefore, of an automobile, who desired its exclusive possession and usage for a time, would need the permission, express or implied, of his co-owners to that end.

[6,7] In the absence of other evidence upon the issue, an inference normally would arise, upon proof of co-ownership and use of personal property by one co-owner, that such usage was lawful and with the consent of the absent co-owner, but this inference would not be conclusive. For example, one of the owners in common of an automobile, who by agreement with his co-owner has no right to operate it, takes it without the knowledge or actual consent or negligent omission of his co-owner. He, the operator in this supposed example, who has never used the vehicle before, might not possess an operator's license; he might be an infant, an incompetent, an imprisoned felon, blind, or lacking other natural faculties. It would scarcely be a reasonable inference (from evidence showing merely the fact of co-ownership and a single, isolated usage) that one co-owner of an automobile had consented to the operation of the common property by another co-owner who did not possess an operator's license, or who was a four-year-old infant, a known imbecile, a prisoner who had escaped without the knowledge of

the co-owner, or utterly blind. In other words, it is a question of fact in cases of co-ownership, as it is in cases of single ownership, whether the operation of an automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation. The mere fact of co-ownership does not necessarily or conclusively establish that the common owners have consented to any usage or possession among themselves of a type for which permission is essential. Indeed, the creation of the co-ownership itself may not have been by mutual consent. It could arise by operation of law, as by vesting of title by descent.

[8,9] It was error for the court to neglect to find directly on the essential issue of whether Paul Malloy's operation of the automobile at the time of the accident was with, or was without, Claire E. Malloy's permission. Upon the record, particularly in consideration of the probative fact found as above set forth, we cannot assume that the omitted finding, if made, would have been adverse to plaintiffs. A reversal of the judgment is necessary. (See *Huntington v. Vavra* (1918), 36 Cal.App. 352, 355, 172 P. 166; *Hinman v. Conard* (1936), 14 Cal.App.2d 540, 543, 58 P.2d 732; *Bertrand v. Pacific Electric Ry. Co.* (1941), 46 Cal.App.2d 7, 9, 115 P.2d 228; *Diamond v. Grath* (1941), 46 Cal.App.2d 443, 447, 116 P.2d 114; *Bolton v. Logan* (1941), 46 Cal.App.2d 739, 740, 116 P.2d 801.)

[10] It is, of course, too obvious to justify more than passing mention that on this appeal, with none of the evidence before us, we cannot ourselves make or direct a finding resolving the disputed issue of fact, either in favor of the defendant Claire E. Malloy to support his judgment against the plaintiff or in favor of the plaintiff and supporting a judgment contrary to that which was rendered. The determination of such issue of fact must await the new trial.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

CURTIS, Justice (dissenting).

I have not joined in the foregoing opinion for the reason that, as I view the case, the opinion fails to give adequate consideration to the one question upon



which the case was tried and upon which the appeal was based. That question, as expressly stated by each of the parties, is as follows: "Where a father and a minor son are co-owners of an automobile, operated by the father in his own right as co-owner and not upon the business of the son, the son not being present in the automobile, is the son liable for the negligence of the father?" This question was elaborately argued by each of the parties, and a line of authorities was cited in support of their respective contentions. Yet this court by the foregoing opinion has indirectly decided this very question without the citation of any authority, and with no discussion of the authorities cited in the briefs of the respective parties.

I say that this court has indirectly decided this question, and in support of this assertion I refer to the following statement in the foregoing opinion: "In the absence of other evidence upon the issue, an inference normally would arise, upon proof of co-ownership and use of personal property by one co-owner, that such usage was lawful and with the consent of the absent co-owner." Neither party to this action contends that there was any evidence in the record to rebut this inference. On the other hand, they have each in their statement of the question before us set forth a complete statement of the facts upon which they rely, and this statement of facts contains nothing which would rebut the inference that the automobile was being driven by one co-owner with the consent of the other. The opinion reverses the judgment and sends the case back for a new trial. Upon such a trial the statement from the opinion just quoted will become the law of the case and will be decisive of the rights of the parties unless the defendants are able to show a different state of facts than that which both the plaintiffs and defendants now agree is before the court in the present action.

This was the precise question argued by each of the parties before the District Court of Appeal and decided by that court. It was the precise and only question before us when we granted a hearing after the decision of the District Court of Appeal, and it is the only question raised by the parties in their respective briefs. The failure of the trial court to make a finding as to whether the father was operating the automobile at the time of the accident with the consent of his son was not raised in

any manner by either of the parties, and consequently has not been either argued or briefed by either of them. For these reasons I renew my assertion that the present opinion is entirely inadequate to dispose of the issues before us.

I am further unable to agree with the statement in the foregoing opinion that "Indeed, the creation of the co-ownership itself may not have been by mutual consent. It could arise by operation of law, as by vesting of title by descent." This possibly might have been a defense to the action. It could only have been raised by the defendants. Not only have the defendants not made this defense, but they expressly state in their brief that the purchase price of the automobile was paid for by both the father and the son. This admission would preclude any theory that the automobile was acquired by the co-owners except by mutual consent.



22 Cal.2d 183

PEOPLE v. GUERRERO.

Cr. 4438.

Supreme Court of California.

May 3, 1943.

#### 1. Criminal law ⚡1023(10)

Where defendant was ordered on probation by suspending imposition of sentence, no "final judgment" of conviction was rendered against defendant, and his purported appeal from the judgment was dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

#### 2. Criminal law ⚡1023(13)

An appeal from order denying defendant's motion for new trial was entitled to consideration, although purported appeal from judgment of conviction was reversed because no judgment had been entered. Pen.Code, § 1237.

#### 3. Criminal law ⚡1131(3)

Appellate courts should dispose of an appeal on its merits where possible, rather

than to dismiss appeal for some technical defect.

#### 4. Criminal law ☞1124(2)

An appeal from order denying defendant's motion for new trial would be considered, although record failed to refer with particularity to grounds of motion for new trial, where precise basis of motion for new trial could be inferred with sufficient certainty from facts appearing in clerk's transcript. Pen.Code, § 1237.

#### 5. Indictment and Information ☞171

The absence of proof of an immaterial portion of a recitation of fact will not vitiate verdict.

#### 6. Indictment and Information ☞171

The test of materiality of "variance" in an information is whether the pleading so fully and correctly informs a defendant of offense with which he is charged that, taking into account proof which is introduced against him, he is not misled in making his defense.

See Words and Phrases, Permanent Edition, for all other definitions of "Variance".

#### 7. Criminal law ☞1167(1)

Where information, after charging defendant who filed appeal and his codefendants with formation of conspiracy to commit crime of rape, made an averment of unessential element of compulsion in connection with issue of performance of the overt act incident to conspiracy charge, and proof failed to establish element of compulsion, "variance" between pleading and proof did not invalidate conviction on conspiracy count, in view of record showing that defendant was not prejudiced.

#### 8. Criminal law ☞878(3)

An acquittal of substantive offense operates as an acquittal of conspiracy charge based solely thereon only when substantive offense charged is alleged as a single entity to be only overt act in furtherance of conspiracy.

#### 9. Criminal law ☞878(3)

An acquittal upon kidnapping count in information charging separate crimes did not acquit defendant on count charging conspiracy to commit rape, based on same overt acts. Pen.Code, §§ 182, 184, 207, 954.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Paul Guerrero was convicted of conspiracy to commit rape, and he appeals from the judgment of conviction and from an order denying a new trial.

Judgment dismissed and order affirmed.

For prior opinion, see 128 P.2d 160.

J. Bruce Fratis, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Ward Sullivan and David K. Lener, Deputy Attys. Gen., for respondent.

CURTIS, Justice.

In an information filed by the district attorney of Monterey County the defendant Paul Guerrero, with six co-defendants, was charged in separate counts with (1) kidnapping; (2) assault with intent to commit rape; (3) conspiracy to commit rape; and (4) rape. Upon the trial the jury as part of its verdict found the defendant Guerrero not guilty on counts one, two and four, but guilty on count three, the conspiracy charge. It is not important here to distinguish the other defendants with reference to the verdict returned on the respective designated charges at the conclusion of the joint trial, and it will suffice to note generally that, as to those defendants, the jury found all not guilty on count one, four guilty on count two, all guilty on count three, and three guilty on count four. Motions in arrest of judgment, for dismissal of the information and for a new trial were presented by defendant Guerrero and denied. Judgment was suspended as to this defendant on his conviction under count three, and he was granted probation for the term of five years. Defendant Guerrero gave notice of appeal from the judgment and also from the order denying his motion for a new trial.

[1-4] Preliminarily it should be observed that since defendant Guerrero was ordered on probation by suspending the imposition of sentence, no final judgment of conviction was rendered against him, and his purported appeal from the "judgment" must be dismissed. *People v. Gibbons*, 39 Cal.App.2d 671, 673, 103 P.2d 1005; *People v. Johnson*, 14 Cal.App.2d 373, 375, 58 P.2d 211; *People v. Von Eckartsberg*, 133 Cal.App. 1, 3, 23 P.2d 819; *People v. Noone*, 132 Cal.App. 89, 92, 22 P.2d 284; 8 Cal.Jur. 493. However, his appeal from



the court's order denying his motion for a new trial is entitled to consideration, for section 1237 of the Penal Code specifically permits an appeal from such an order. While in this connection it must be said that the record herein is subject to criticism because of its failure to refer with particularity to the grounds of the motion provoking the order now presented for review, this deficiency will be overlooked in view of the following pertinent facts appearing in the clerk's transcript: The motions in arrest of judgment, for dismissal of the information, and for a new trial as made by defendant Guerrero after the jury's verdict of conviction against him on count three, as above noted, were argued before the trial court at the same time; the motion for dismissal was based on definitely stated grounds and was supported by an elaborate memorandum of points and authorities; the court took all three motions under submission at the same hearing and thereafter made simultaneous rulings thereon contrary to defendant Guerrero's single line of argument, which incidentally constitutes the lone premise of the present appeal. From such condition of the record the precise basis of the trial court's order denying the motion for a new trial may be inferred with sufficient certainty to permit this court's consideration of the authorized appeal as here taken. This conclusion is in harmony with the settled practice of the appellate courts to dispose of an appeal on its merits where possible, rather than to dismiss it for some technical defect. Accordingly, the following review of the controversial matter presented by the briefs on file herein is undertaken.

The single point urged as a ground for reversal is the proposition that the overt acts averred in the conspiracy count are identical with the conduct alleged to constitute kidnapping, so that the acquittal on the latter charge rendered legally impossible a conviction on the former.

Admittedly, the separate charges relate to the same state of facts or transaction—the defendants' meeting with the prosecutrix late at night on a street in the city of Salinas and their taking her in a truck several miles into the country, where the attack was made. The only material dispute in the evidence is whether the prosecutrix voluntarily accompanied the defendants as they testified, or whether she was taken forcibly and against her will, as she claimed. The jury apparently elected to accredit the defendants' account and for that

reason found them not guilty of the kidnapping charge specified in the information, reciting that "said defendants \* \* \* and each of them \* \* \* did wilfully, unlawfully, and feloniously *forcibly* steal, take, and arrest [the prosecutrix] \* \* \* and did carry said [woman] into another part of said county, for the purpose and with the intent to employ said [woman] for his own use and for the use of each of the other defendants named." (Italics ours.) There is no conflict in the evidence as to the fact that a forceful and mass assault was committed on the prosecutrix without her consent, that the appellant knew that such was the purpose of his co-defendants, and that he aided them in the accomplishment of this object.

[5-7] After charging the defendants with the formation of the conspiracy to commit the crime of rape, the information delineated two overt acts in the following language: (1) "That in pursuance of said conspiracy and to effect the object of the same, the said defendants [Guerrero and two others] \* \* \* *by means of force and violence, compelled* [the prosecutrix] \* \* \* *against her will*, to accompany them, \* \* \* to a park \* \* \* in the city of Salinas, \* \* \*," (2) "That in pursuance of said conspiracy and to effect the object of the same, the said defendants [Guerrero and five others] \* \* \* *by means of force and violence, compelled* said [woman] \* \* \* *against her will*, to accompany them \* \* \* from the city of Salinas to a point in said county of Monterey outside of the incorporated limits of said city of Salinas." (Italics ours.) While the element of force, advanced by the italicized language as a factor accompanying the defendants' taking of the prosecutrix from one place to another in furtherance of the unlawful object of the conspiracy, was not established to the satisfaction of the jury in view of the acquittal on the kidnapping charge, such variance between the pleading and proof will not invalidate the conviction on the conspiracy count. The *taking* of the prosecutrix to the specified places constituted the gist of the overt acts relied upon as evidencing the defendants' formation of the conspiracy, and the presence or absence of compulsion in effecting such removal added nothing to the sufficiency of that accusation. The absence of proof on an immaterial portion of a recitation of facts will not vitiate the verdict. 31 C.J., p. 840, § 451; 14 Cal.Jur., pp. 95-96, § 72;

*People v. Handley*, 100 Cal. 370, 34 P. 853; *People v. Stevens*, 78 Cal.App. 395, 248 P. 696; *People v. Mizer*, 37 Cal.App. 2d 148, 99 P.2d 333. Test of the materiality of variance in an information is whether the pleading so fully and correctly informs a defendant of the offense with which he is charged that, taking into account the proof which is introduced against him, he is not misled in making his defense. *People v. Freeman*, 29 Cal.App. 543, 156 P. 994; *People v. Jacobs*, 11 Cal.App.2d 1, 52 P.2d 945; *People v. Woodson*, 11 Cal.App.2d 604, 54 P.2d 33. When this test is applied to the situation which is here presented, the immateriality of the variance is immediately apparent. Appellant and his co-defendants testified at length on the manner and character of the prosecutrix' removal to the places designated in the information, and all maintained that she accompanied them freely and voluntarily. In this condition of the record, attesting the commission of the specified "acts of taking" though without force in acceptance of defendants' version of the affair, it cannot be said that appellant was misled or prejudiced by the averment of the unessential element of compulsion in connection with the issue of performance incident to the conspiracy charge, nor that the conviction on that count is lacking in evidentiary support.

In his argument as to the effect of an inconsistency in the verdict, the appellant relies principally on two cases: *Oliver v. Superior Court*, 92 Cal.App. 94, 267 P. 764, and *In re Johnston*, 3 Cal.2d 32, 43 P.2d 541. Neither is in point under the facts here involved. In *Oliver v. Superior Court*, supra, the distinctive issue is stated at pages 96, 97, of 92 Cal.App., 267 P. at page 765: "It is important to note the fact \* \* \* that the only overt acts alleged in count 34 [conspiracy] are the specific crimes charged in the other [33] counts; the sole overt acts averred were 'larceny and embezzlement.' The situation is clearly different from that which would have been presented had the conspiracy charge contained allegations of a number of overt acts which, taken together, would constitute grand larceny or embezzlement. Had the indictment been so drafted, it could not be said that an acquittal of grand larceny or embezzlement would necessarily have been a determination that no criminal conspiracy pertaining to the same transactions had occurred. But here the conclusion cannot be escaped that since each crime, considered and described collectively as a

single entity, is alleged to be an overt act, and as the jury fully acquitted these petitioners of each overt act thus alleged, the portion of the count charging conspiracy remaining unadjudicated is insufficient to constitute criminal conspiracy." (Italics ours.) This quotation plainly shows that the premise of the decision as expressed in the opinion is that the alleged overt act and the substantive crime alleged were the same inseparable act, "a single entity."

[8] Predicated upon the doctrine of the *Oliver* case and involving a like factual situation is *In re Johnston*, supra, where the defendants were charged with thirteen counts of violating the Corporate Securities Act, St.1917, p. 673, as amended, and one count of conspiracy to violate said act, the sole overt acts alleged being "identical with and mere repetition of, the crimes charged in the preceding [13] counts." [3 Cal.2d 32, 43 P.2d 542.] The jury acquitted the defendants of all thirteen counts of violation, but found them guilty of conspiracy. In concluding that the conviction could not be sustained because the jury, having found the defendants not guilty of the overt acts, had virtually acquitted them of the conspiracy, the court precisely stated the controlling principle at pages 35, 36 of 3 Cal. 2d, 43 P.2d at page 542, as follows: "We are in accord with the reasoning of the *Oliver* case and, to show how closely the cases follow each other, we direct attention to the fact that the petitioners here were charged in count 1 with the commission of 'an overt act done in furtherance of the conspiracy and to carry out the same' in that they 'did wilfully, unlawfully, feloniously and knowingly, on or about the ninth day of August, 1930, issue and sell and cause to be issued and sold shares of capital stock.' This language follows the exact language of the remaining counts charging the specific crime of violation of the Corporate Securities Act. Hence it cannot be said that an element is contained in the overt act which is not also contained in the specific charge, nor vice versa. They are to all intents and purposes identical." (Italics ours.) Thus is established the principle that "it is only when the substantive offense charged is alleged as a single entity to be the only overt act in furtherance of the conspiracy that an acquittal of the substantive offense operates as an acquittal of the conspiracy charge based solely thereon." (Italics ours.) *People v. Gilbert*, 26 Cal.App.2d 1, 22, 78.

P.2d 770, 782; *People v. Yant*, 26 Cal.App. 2d 725, 731, 80 P.2d 506.

[9] The present situation does not concern the consideration of separate counts charging identical offenses, but, as indicated by the above quotations from the respective charges in the information here under discussion, two distinct crimes are pleaded and different elements are involved in each. The kidnapping charge follows the wording of the statute (Pen.Code, § 207), wherein the presence of some form of compulsion is identified as the gravamen of the offense. The conspiracy count is an independent accusation (Pen.Code, §§ 182, 184), based upon the criminality attaching to an unlawful agreement manifested by the performance of some act in execution of the joint design. *People v. George*, 74 Cal.App. 440, 241 P. 97. While the overt acts detailed in the conspiracy count relate to the alleged forceful removal of the prosecutrix from one place to another, upon which course of conduct the kidnapping charge is predicated, significantly the acts are not delineated "in the exact language" of the count charging the specific crime of kidnapping, nor is the latter offense mentioned as "a single entity" in such recital. In other words, it is at once apparent that the overt acts in no way set forth or attempted to set forth the substantive offense of kidnapping, but that they merely purported to show that the defendants' taking of the prosecutrix into the country was for the purpose of enabling the entire group to accomplish their purpose of a combined assault. The factor of force, vital to the proof of the kidnapping charge, contributed nothing to the adequacy of the conspiracy accusation, but simply colored the averment of the overt acts, and accordingly in that connection, constituted mere superfluous recital under the rule of law stated in the forepart of this discussion. From the fact of appellant's acquittal upon the kidnapping charge of the information containing alternative counts, it does not follow that the jury found all of the elements essential to the statement of that offense absent, but merely that they found absent elements distinguishing it from the conspiracy offense alleged in an independent count. *People v. Day*, 199 Cal. 78, 248 P. 250; *People v. Cordish*, 110 Cal.App. 486, 294 P. 456. The same principle is forcefully expressed in *People v. Hickman*, 31 Cal.App.2d 4, 11, 87 P.2d 80, 83, as follows: "When the defendant is convicted of one and acquitted upon an-

other count, the test is whether or not the essential elements in the count wherein the defendant was acquitted are identical and necessary to proof of conviction on the guilty count." In the light of these observations, there is clearly no inconsistency or repugnancy in the jury's conclusions in the present case. While the acquittal in the kidnapping count negated the jury's finding of force in connection with the defendants' taking of the prosecutrix to the places mentioned in the information, such determination did not preclude the jury's acceptance of the ample evidence substantiating the fact of the prosecutrix' removal in furtherance of the unlawful design, as proof of the overt acts in essence as recited in the conspiracy count. In these circumstances it is plain that the conviction on the conspiracy charge is in accord with the record showing in the matter and consequently will not be disturbed on appeal.

Moreover, in contemplation of just such situation as is here presented, section 954 of the Penal Code, as amended in 1927, provides that an information may charge two or more different offenses connected together in their commission, and that a verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count. *People v. Ranney*, 123 Cal.App. 403, 11 P.2d 405; *People v. Derenzo*, 46 Cal.App.2d 411, 115 P.2d 858. The scope and force of this code provision in answer to claims of inconsistency in a jury's verdict have been the subject of recent discussion by this court in the cases of *People v. Amick*, 20 Cal.2d 247, 125 P.2d 25, and *People v. Kearney*, 20 Cal.2d 435, 126 P.2d 612, and the point of application requires no additional treatment here.

The appeal from the judgment is dismissed and the order denying a new trial is affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, Justice (dissenting).

I do not join in the decision affirming the order appealed from for the reason that the record does not show the grounds upon which the appellant moved the trial court to grant a new trial. For almost fifty years the appellate courts have consistently followed the rule that an order denying a new trial cannot be reviewed unless the record upon appeal not only



shows that such a motion was made but also the grounds upon which it was based. *People v. Johnston*, 37 Cal.App.2d 606, 100 P.2d 307; *People v. McCoy*, 71 Cal. 395, 12 P. 272. This rule, in my opinion, requires a dismissal of the appeal.



# **TOMAIER v. TOMAIER.\***

Civ. 3096.

District Court of Appeal, Fourth District,  
California.

May 6, 1943.

Rehearing Denied June 3, 1943.

Hearing Granted July 1, 1943.

## **1. Joint tenancy** Ⓒ3

The intention of the parties in creating a joint tenancy is required by statute to be expressly declared in the instrument creating the tenancy. Civ.Code, § 683.

## **2. Evidence** Ⓒ441(1)

Parties having agreed in writing to a certain thing may not at the same time and in connection with the same thing orally agree to a contrary effect.

## **3. Husband and wife** Ⓒ249

### **Joint tenancy** Ⓒ1

A "community estate" and a "joint tenancy" are different and inconsistent estates.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Estate" and "Joint Tenancy".

## **4. Evidence** Ⓒ426, 461(4)

Parol evidence is inadmissible to establish that parties in creating a joint tenancy through written expression of their intention so to do, as required by statute, actually intended and agreed to create another and inconsistent estate. Civ.Code, § 683.

## **5. Evidence** Ⓒ426, 461(4)

In divorce action, in absence of allegation of fraud, parol evidence was inadmissible to prove that though parties acquired property in joint tenancy, with written expression of their intention so to do, as required by statute, they actually in-

tended and agreed to hold such property as community property. Civ.Code, § 683.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action for divorce by Charles Tomaier against Mildred Tomaier, wherein plaintiff was awarded a divorce and certain properties were divided between the parties. From that portion of judgment decreeing that certain property is not community property but is jointly owned by plaintiff and defendant as joint tenants, plaintiff appeals.

Judgment affirmed.

Alfred Siemon, of Bakersfield, for appellant.

Edward M. Selby, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for divorce. The complaint alleges, among other things, that the parties are the owners of certain described properties "all of which property is the community property" of the parties. Several parcels of property are then described and with respect to three of the parcels a description of the property is followed by "which property is held in joint tenancy". On a former appeal this court affirmed that part of the judgment granting the plaintiff a divorce, but reversed that part by which it was adjudged that the three parcels of this property which were alleged to be held in joint tenancy were the community property of the parties and which awarded the major portion thereof to the plaintiff. *Tomaier v. Tomaier*, 50 Cal.App.2d 516, 123 P.2d 548. This court there held that the trial court had no power to divide the property held in joint tenancy as though it were, in fact, community property. In that decision it was further observed, without holding that such evidence would have been proper, that there was no evidence in the record of any intention of the parties that the property should be held other than in joint tenancy.

On a retrial of the action, with respect to the property rights of the parties, the court sustained objections to all questions directed toward disclosing the source of the funds which went into the purchase of these three properties which were alleged to be held in joint tenancy, or with respect to the intention of the plaintiff at the time

\* Subsequent opinion 146 P.2d 905.



of and in connection with the taking of title in this form and the creation of these joint tenancies, respectively. Plaintiff's counsel also offered to prove, with respect to one of these properties, that it was purchased long after these parties were married; that at that time the parties had no funds except such as came from their earnings or the earnings of the plaintiff; that, thereafter, they borrowed money to improve the property or to pay carrying charges on the credit of the parties or on the credit of the plaintiff; that all such subsequent borrowings and costs were community property; that there was no understanding or agreement at any time that such obligations or moneys were to be "other than such as commonly occur in the relations of husband and wife"; and that there was no understanding that the wife was to have any part of these earnings as her separate property. An objection to the offer of proof was sustained. Findings were waived, and the court adjudged and decreed that each of the three parcels in question "is not community property of the parties but is jointly owned by the plaintiff and the defendant as joint tenants." The plaintiff has appealed from that part of the judgment.

As stated by the plaintiff, the sole question presented is "whether, in a divorce case, parol evidence is admissible to show that property standing in the name of the husband and wife as joint tenants is, in fact, community property." The plaintiff relies particularly upon *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003, and *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513. It is argued that in the *Siberell* case the essential holding is that the trial court did have power to find that property held as joint tenants was nevertheless community property and that the court there affirmed the judgment which decreed that the real property thus held in joint tenancy was, in fact, community property.

As we read that case, it holds that the property in question was held by the parties in joint tenancy and not as their community property. While, apparently, there was no evidence in the record relating to the intention of the parties at the time the property was thus acquired the court pointed out that from the very nature of the estates a community estate and a joint tenancy cannot exist at the same time as to the same property. The court then said [214 Cal. 767, 7 P.2d 1005]:

"The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held community property, but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character and, following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors, and other complications which would defeat the right of survivorship, the chief incident of the law of joint tenancy. A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive.

"\* \* \* it seems to us to be clear, as already pointed out above, that a joint tenancy, the evidence of which the law requires to be on the face of the conveyance creating it, is of necessity an expression of the intention to hold the property otherwise than as community property, and that the equal interest of the spouses must therefore be classed as their separate but joint estate in the property."

After commenting on certain cases the court then said: "It is to be noted that, as between husband and wife and third persons, they were not permitted to gainsay their joint act by introducing evidence at variance with their agreement."

After thus holding with respect to the property which had been acquired in joint tenancy by the parties in 1913 the court further discussed the effect of a deed executed in 1918 by which the husband purported to grant the whole of the property to the wife. In that connection, the court states that the testimony with reference to the circumstances under which the deed of 1918 was executed is sufficient evidence to support the finding that the property was community property. This is given as an additional reason why the judgment dividing the property equally between the spouses except for an additional burden placed on the husband in connection with a mortgage, should not be disturbed. The judgment was then affirmed because it clearly appeared that the wife had suffered no injustice and since a new trial of the action could not benefit her. In saying

that certain evidence in connection with the deed of 1918 was sufficient to support the finding that the property was community property the court was discussing the effect of the 1918 deed from the husband to the wife, and not only was this merely advanced as an additional reason disclosing that the judgment of the court was just and correct under any view of the case, but we think it was not intended thereby to nullify all that had theretofore been said about the effect of the creation of this joint tenancy and the holding in that connection which was the main ground of the decision.

[1-4] In the subsequent case of *Delanoy v. Delanoy*, supra [216 Cal. 23, 13 P.2d 514], the court said: "This court has recently determined that, in the absence of any evidence of an intent to the contrary, when property is purchased with community funds and the title is taken in the name of the husband and wife as joint tenants, the community interest must be deemed severed by consent, and the interest of each spouse therein is separate property. *Siberell v. Siberell*, [214 Cal. 767], 7 P.2d 1003."

The plaintiff here argues that this use of the phrase "in the absence of any evidence of an intent to the contrary" directly implies that in spite of the fact that property is held by a husband and wife in joint tenancy evidence may be received as to the intention of the parties at the time of and in connection with the creation of that joint tenancy for the purpose of showing that, in fact, they intended that the property should be held as community property and not in joint tenancy. While it is not entirely clear just what was intended by the use of that phrase it does appear that in that case, also, a deed had been executed by the husband five years after the property was acquired in joint tenancy. It may be that the court had in mind the possibility that although property was acquired and held in joint tenancy by a husband and wife they might, by subsequent agreement, change their tenancy interest into community property and that this might be established by evidence of an intention so to do. Be that as it may, the phrase we have quoted is dicta in that case. The qualification stated in the *Delanoy* case does not expressly appear in the *Siberell* case, and

in the absence of a direct expression from the Supreme Court we do not feel that it should be taken as overruling the statements in the *Siberell* case with respect to the binding character of the agreement between the spouses in connection with the taking of title to property in joint tenancy. The intention of the parties in creating a joint tenancy is required by statute to be expressly declared in the instrument creating the same. Civ.Code, § 683. It is a well established principle of law that parties having agreed in writing to a certain thing may not at the same time and in connection with the same thing orally agree to a contrary effect. *Cobbs v. Cobbs*, 53 Cal.App. 2d 780, 128 P.2d 373. A community estate and a joint tenancy are different and inconsistent estates and parties should not be allowed to prove by parol that in creating a joint tenancy through a written expression of their intention so to do, as required by law, they actually intended and agreed to create another estate which was inconsistent therewith.

[5] If, as the plaintiff argues, it is possible for a husband and wife, having created a joint tenancy interest in certain property, to thereafter change this into community property and that oral evidence is admissible for the purpose of showing an intention to accomplish this result, we have no such situation before us. The complaint alleges nothing with respect to the properties in question other than that it is community property which is held in joint tenancy. There is no allegation of fraud or of any subsequent deed or agreement, or of any act or intention in connection therewith. The evidence and the offer of proof which appear in the record relate only to the situation and circumstances in connection with the acquiring of this property by the parties in joint tenancy. The sole question here presented is whether, under our law, parties who acquire property in joint tenancy, with the necessary written expression of their intention in that regard, are entitled to prove by oral evidence that they had no such intention but, in fact, intended to do something entirely different. This, we think, they may not do.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

58 Cal.App.2d 543

**LANGHAM et al. v. NORLANDER.**  
Civ. 14007.

District Court of Appeal, Second District,  
Division 1, California.

May 7, 1943.

**Automobiles ☞245(4)**

In action against motorist who ran over child 16 months old while backing automobile out of private driveway, where there was no evidence regarding whether the child was under the automobile or back of it when automobile was started in motion, whether motorist was negligent was for jury.

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Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Personal injury action by James Lee Langham, a minor, by Louis E. Langham, his guardian ad litem, and Louis E. Langham, individually, against Warner J. Norlander, Jr. Judgment for defendant, and plaintiffs appeal.

Affirmed.

William E. Empey, of North Hollywood, for appellants.

Crider, Runkle & Tilson, of Los Angeles, for respondent.

YORK, Presiding Justice.

The complaint herein alleged generally that the defendant so negligently, carelessly and unlawfully operated his automobile while backing it out of a private driveway, that he ran over the minor plaintiff, a child aged sixteen months, "thereby throwing him to the ground with great force and violence", and as a result thereof said plaintiff sustained severe and permanent injuries. The answer denied all allegations of negligence or carelessness in the operation of the automobile by defendant, did not raise the issue of contributory negligence, but alleged that the accident in question was unavoidable. The jury brought in its verdict in favor of defendant, and this appeal is prosecuted from the judgment which was thereafter entered pursuant to such verdict.

The record herein reveals the following undisputed facts: On April 24, 1941, the day of the accident, the Langham family, consisting of the parents, the injured child

and his older brother, aged four years, had been residing for about one year at 11309 Killion Place, North Hollywood, which premises adjoined on the west the private driveway where the accident occurred. The Schultz family, consisting of the parents and two children, aged nine and six years, respectively, resided next door to the Langhams at 11303 Killion Place, which adjoined the driveway on the east. The Schultz home was on the rear of the lot and in front of both houses were lawns surrounded by picket fences on the outside, and separated only by the private driveway. This driveway was 14 feet 11 inches in width, to the right of which a large pepper tree was growing, and north of the tree close to the driveway was a small bush. The Schultz and Langham children and other children of the neighborhood were in the habit of playing on the Schultz and Langham lawns practically every day when the weather permitted.

Respondent Norlander had known Mrs. Schultz for many years and was a frequent visitor at the Schultz home during the four and a half months they had resided at the Killion Place address, calling there once or twice a week during the daytime, as he was working nights. Respondent testified that prior to the day in question he had noticed both the Schultz and Langham children playing on the lawn in front of their homes; that he usually drove into the driveway and parked his car two feet off the driveway with the right wheels two feet over on the lawn, and on April 24th he parked his automobile "between the pepper tree and the bush, with the right front fender nearly touching the bush", and that when he drove in on that day he noticed the Schultz children in the yard but did not notice the Langham children. Respondent went to the Schultz home with the intention of picking up his wife and taking her home, but due to the fact that Mrs. Schultz was ill, Mrs. Norlander decided to stay, consequently he remained about ten minutes and left, his wife accompanying him to his car. He opened the rear door of the automobile and placed a package of laundry in the back seat, meanwhile talking to his wife, who was standing "alongside" of him. He then walked around in front of the car, got into the driver's seat, closed the door and started the motor. Before starting the motor, however, respondent looked out of the rear window and out of the window on the left side of the automom-



bile. He said goodbye to his wife and the Schultz children and looking through the rear window he started to back his car out of the driveway. When he had traveled three-fourths of the length of his car, his wife shouted to him and he stopped after he had gone about the full length of the car. When he got out of the car, his wife was directly in front of it, close to the right front wheel, and she reached and pulled the infant James Lee Langham from underneath the front of the automobile.

Respondent further testified that before he started the motor he looked directly out of the rear window and "could see the ground approximately at the entrance to the driveway, just a little inside of the sidewalk line"; that he looked toward the left on the driver's side and did not look out of the right side of the car at any time, "only what I could see when I turned to my right and looked out of the rear window, what view I could catch of the road looking out of the rear window of the car also"; that he did not pay any particular attention to the right side; "as a matter of fact, the pepper tree would be in the way on the right side of the car \* \* \* in order to back up I would have to drive a little to the left in order to miss the tree, and when I looked out of the back of the car the tree was right at the right rear fender, in line with this bush." He further testified that he had seen the injured child playing on the lawn many times before he drove in on April 24th.

Mrs. Langham, the mother of the injured child, testified that respondent drove in about half past four or a quarter to five on the day in question; that he had been there for about five minutes when "I was sitting there, and I went into the house after my sewing, and left the children on the lawn; \* \* \* they were all there playing \* \* \* I went from the lawn directly into the house to get my sewing and a few things I had there, and I went right back, and when I got to the door—I didn't stop for anything—they came and told me that Jimmie had been (hurt)."

Appellants urge that the evidence is insufficient to support the judgment for the reason that respondent was guilty of negligence as a matter of law, when he backed his automobile in the private driveway of a family yard, without looking backward to the right and to the left to see whether any small child might be in or near the backward path of his car.

In support of this contention, appellants cite the cases of *Cambou v. Marty*, 98 Cal. App. 598, 277 P. 365, and *Gorzeman v. Artz*, 13 Cal.App.2d 660, 57 P.2d 550. In the *Cambou* case it was stated at page 603 of 98 Cal.App., at page 367 of 277 P.: "Any reasonable man can be charged with knowledge that a child is apt to be found at any place about the family yard. Charged with that knowledge, it becomes his duty to use vigilance and care before setting in motion a dangerous instrumentality in that locality. Failing in the duty he is negligent. We cannot concede that it is a harsh burden to place upon a visitor at a family home. Where a life may be jeopardized by a failure to make certain a clear path it surely is not unreasonable, as a matter of law, to insist that ordinary care demands some precaution before starting an automobile. Nor is it unreasonable to include within the required precaution the duty here announced. In the annotation to 44 A.L.R. at page 434, it is said: 'The tendency of the later cases would seem to indicate that the courts are requiring a higher degree of care on the part of the operators of automobiles toward children playing on or in proximity to their automobiles, \* \* \* particularly in those cases in which the driver had notice of the children's presence on or about the machine.' At this stage of our economic progress all the best thought is being directed toward child welfare and the promotion of the physical, mental, and moral welfare of the generation to succeed the present. A logical following out of the idea would suggest that in all contact with children a higher standard of care be established as necessary to meet the law's requirement of ordinary care under the circumstances. Concluding the present inquiry, it is obvious that a course of conduct which indicates no care at all and a complete disregard of any caution will not measure up to such a standard or to any standard of ordinary prudence."

The *Gorzeman* case was an action by a parent and guardian ad litem for damages for personal injuries sustained by a three year old infant when a bakery truck backed over him. In that case the operator of the bakery truck was backing the truck in the driveway which circled plaintiff's home, from such a position that he could not see where he was backing, although he might have known that children were present. The court held that it was the duty of the operator to use vigilance and care before



setting in motion the automobile in that locality, and having failed in that duty, that he was negligent.

The actions and conduct of the drivers in the cited cases, in so far as care and prudence are concerned, are not comparable with the conduct of the driver of the automobile in the instant case.

Respondent admitted that he frequently visited the Schultz family and many times prior to the day of the accident he had seen the children of both families, including the injured child, playing on the front lawns of their homes adjacent to the driveway. Also, he admitted that while he looked to the left of his car as he started to back, he paid little or no attention to the right side, because the pepper tree was in the way on that side. This states the case in the light most favorable to appellants' contentions.

However, there was no evidence produced herein showing or tending to show whether the infant appellant was back of respondent's car or under the car when the same was put in motion. The child was picked up from under the front of the car after respondent had backed said car its full length. Although there were several small children near the car when the door was closed and the motor started, as well as a moment or so later when the car itself was backed, no one seems to have seen the child except when he was under the front end of the car. The very serious injuries sustained by the infant appellant were not such as would indicate whether he was back of the car and was knocked down, or whether he had crawled underneath the car and was injured by the underpart of the car. Therefore, it cannot be said that it was negligence as a matter of law, under the facts proved, to back the car "without first looking backward to the right and left for the likely presence of small children" or "without any other precaution to ascertain the likely presence of small children than looking backward from a sitting position in the front seat." If the jury had found that the child was in the rear of the automobile or where he could have been seen had respondent used other precautions than he did use, the cases cited by appellants would have been in point, but there is no direct evidence as to whether said child was under the car or back of it when it was started in motion.

The jury might well have concluded from all of the circumstances that the child was not in a position where he could have

been seen by respondent before the latter started to back his automobile, unless respondent got down on the ground and looked underneath his car. Respondent called goodbye to the other children nearby, and the jury might have concluded that if the child was back of the car, some of the other persons present would have seen the child before he was discovered under respondent's car, or at least that respondent was entitled to assume that he would have been warned of the child's whereabouts.

Under the circumstances presented by the record, the question of respondent's negligence was a question of fact for the determination of the jury, and its verdict either for or against respondent would have to be upheld by this court.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



58 Cal.App.2d 588

**GARRA v. SUPERIOR COURT IN AND  
FOR SAN DIEGO COUNTY.**

**Civ. 2895.**

**District Court of Appeal, Fourth District,  
California.**

**May 14, 1943.**

**1. Guardian and ward ☞162**

An order, in guardianship proceeding, directing entry of judgment against guardian for attorney's fees in favor of guardian's attorney who was not a party to the proceeding, was "void", and court was without jurisdiction to order execution to issue thereon. Probate Code, § 1556.

See Words and Phrases, Permanent Edition, for all other definitions of "Void Order".

**2. Prohibition ☞10(2)**

Where judgment entered in favor of guardian's attorney against guardian in guardianship proceeding to which attorney was not a party was void, "prohibition" was proper remedy to restrain court from attempting to enforce the judgment or or-

der directing guardian to show cause why she should not be held in contempt for failure to pay judgment. Probate Code, §§ 1556, 1630.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

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Proceeding in prohibition by Lizzie Keenan Garra against the Superior Court of the State of California in and for the County of San Diego, to restrain such court and L. N. Turrentine, judge thereof, from proceeding further against petitioner in a proceeding wherein personal judgment was entered against petitioner for attorney fees in favor of attorney who was not a party to guardianship proceeding, and ordering that execution issue thereunder.

Writ granted.

O. C. Ludwig, of National City, and John A. Hewicker, of San Diego, for petitioner.

Clarence Harden, of San Diego, for W. C. Wilde.

GRIFFIN, Justice.

On April 1, 1921, petitioner herein was appointed guardian of the person and estate of Margaret Louise Garra, a minor. On April 9, 1921, letters were issued and were in full force and effect until November 9, 1942, when the guardian was discharged by order of court. On December 22, 1934, the minor reached her majority. On July 5, 1935, the court settled the final account of the guardian in which the court attempted to award one W. C. Wilde, the attorney for the guardian, the sum of \$100 as attorney's fees, to be paid from the assets of the estate for services rendered by him. The order for such attorney's fees ran directly to said attorney and did not provide that said amount should run as an allowance to the guardian for the purpose of paying the attorney. On November 10, 1942, one day after the guardian had been discharged, and five years after the account was settled attempting to allow the attorney's fees above mentioned, Wilde commenced a proceeding in the Superior Court in the guardianship proceeding, under which proceeding an order was issued by the Honorable L. N. Turrentine, judge thereof, directing the former guardian, petitioner herein, to appear before that court on November 17, 1942, to show cause why

she should not (a) be ordered to pay forthwith to W. C. Wilde \$100, plus interest at the rate of 7 per cent from July 5, 1935, and all costs and accruing costs; (b) why execution should not be ordered issued forthwith against her for said \$100, plus interest, costs, etc.; and (c) why she should not be adjudged in contempt of said court for her deliberate refusal and failure fully to pay the same.

On the day appointed for the hearing, the former guardian appeared through her counsel and objected to the jurisdiction of the court to proceed in the matter. The objection was overruled and the hearing proceeded. At the conclusion of the hearing the court made an order as recited in the minutes: "It is ordered that: execution be ordered in accordance with the order to be signed and filed herein." Thereafter, and prior to the signing of any order as directed by the court, counsel for the former guardian asked the court to open the matter for further argument. One John A. Hewicker, an attorney at law, desired to assist the guardian in the matter, believing that the order of the court about to be signed was beyond the jurisdiction of that court. The matter was reopened and briefs were filed. The court refused to withdraw from its former position and thereupon there was presented to that court by W. C. Wilde an order, by which order, if it had been signed by the court, the contempt proceedings would have been dismissed and Lizzie Keenan Garra, petitioner herein, would have been ordered to personally forthwith pay to W. C. Wilde \$100 plus interest and costs and accruing costs, and execution would have been forthwith issued to collect the same.

Prior to the court's signing of that order, which was the order contemplated in its minutes, this petition for writ of prohibition was filed and served.

Petitioner contends that the Superior Court had no jurisdiction to make such an order for execution and that the decree of July 5, 1935, in so far as it purports to award attorney's fees directly to W. C. Wilde, is void, as the court had no jurisdiction to award "judgment" to a person not a party to the proceedings.

[1] The order in the instant proceeding was a direct judgment for money in favor of a person not a party to the proceeding and to that extent was irregular and void. *Keck v. Keck*, 219 Cal. 316, 322, 26 P.2d

300; Pennell v. Superior Court, 87 Cal. App. 375, 262 P. 48; Stevens v. Stevens, 215 Cal. 702, 704, 12 P.2d 426; Chavez v. Scully, 62 Cal.App. 6, 216 P. 46; Samter v. Klopstock Realty Co., 31 Cal.App.2d 532, 535, 88 P.2d 250; Sullivan v. Gage, 145 Cal. 759, 79 P. 537; Estate of Levinson, 108 Cal. 450, 41 P. 483, 42 P. 479; Briggs v. Breen, 123 Cal. 657, 56 P. 633, 886; In re Estate of Kruger, 143 Cal. 141, 144, 76 P. 891; In re Estate of Goodrich, 6 Cal.App. 730, 734, 93 P. 121; Stafford v. Superior Court, 1 Cal.2d 321, 324, 34 P.2d 998; Zagoren v. Hall, 122 Cal.App. 460, 464, 10 P.2d 202; In re Breslin's Estate, 135 Cal. 21, 66 P. 962; Sec. 1556 Probate Code.

[2] The judgment and order for the payment of fees to the guardian's attorney being void, the respondent court was without jurisdiction to enforce such judgment. The order for execution to issue thereon was beyond the jurisdiction of the court to make. Prohibition is a proper remedy herein. In re Estate and Guardianship of Morro, 36 Cal.App.2d 623, 98 P.2d 552; Sec. 1630 Probate Code.

Let a peremptory writ issue.

BARNARD, P. J., and MARKS, J., concur.



58 Cal.App.2d 583

TYLER et al. v. WHEATLAND.

Civ. 3073.

District Court of Appeal, Fourth District,  
California.

May 13, 1943.

#### 1. Mines and minerals ☞99(3)

In action by lessors in a mining lease against alleged general partners in a mining partnership to recover royalties under lease, evidence sustained finding that partnership acquired partners' interest in the leased property, went into possession thereof, and assumed for a period of time to perform the terms of the lease, notwithstanding lack of formal assignment of lease by partners to partnership.

137 P.2d—3

CAL.REP.137-138 P.2d—3

#### 2. Mines and minerals ☞99(3)

In action by lessors in mining lease against alleged general partners of a limited mining partnership to recover royalties under lease, evidence sustained finding that one of defendants, who was originally limited partner, assumed and participated in general management of partnership during seventh and eighth months of the lease and part of ninth month thereof, rendering such partner liable for unpaid minimum royalty for ninth month.

#### 3. Landlord and tenant ☞208(2)

Generally, an assignee of a lease is liable for rent only so long as such assignee remains in possession of the leased property, where there is no covenant on the assignee's part to pay the agreed rent.

#### 4. Mines and minerals ☞99(3)

Member of partnership which had acquired lessee's interest in mining lease, but which had not assumed or agreed to perform obligations of lease, was not personally liable for monthly payments thereunder for months during which partnership was not in possession of premises.

#### 5. Mines and minerals ☞99(3)

Limited partner in mining partnership, who became general partner therein only after obligations to third party on open book accounts had been created, was not personally liable on such accounts, and finding to the contrary was not sustained by the evidence. Civ.Code, § 2411.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Verne S. Tyler and another against E. M. Wheatland and Blake Wilson and others, individually and as general partners of the limited copartnership of "Wilson & Bushnell," and "Wilson & Bushnell," a limited copartnership, to recover royalties alleged to be due under a mining lease. From a judgment for plaintiffs against defendant E. M. Wheatland only, defendant E. M. Wheatland appeals.

Judgment modified and, as modified, affirmed.

Geo. D. Blair, of North Hollywood, for appellant.

John T. Fuller and Frederick E. Stone, both of Porterville, for respondents.



BARNARD, Presiding Justice.

On July 1, 1940, the plaintiffs leased certain mining property to one Pendell, the lease providing for the payment of a minimum monthly royalty of \$250. On August 1, 1940, Pendell, by written agreement, assigned this lease to Blake Wilson and D. S. Bushnell, who assumed and agreed to perform all the covenants of the lease. Blake Wilson and D. S. Bushnell were in possession of the property and, as the court found, operated the same as a general partnership of which they were the sole partners until early in September, 1940.

On September 5, 1940, a certificate of limited partnership was filed in which it was recited that the name of the partnership was to be "Wilson and Bushnell," that Blake Wilson and D. S. Bushnell were general copartners, and that the defendant Wheatland and some nineteen other persons were limited partners, having contributed named amounts and being entitled to named percentages of the profits. No written assignment of the lease was made to this limited partnership by Blake Wilson and D. S. Bushnell and there was no written assumption of its obligations on the part of the new partnership. The new partnership went into possession of the property early in September, 1940, and conducted mining operations thereon until May 1, 1941.

On May 1, 1941, the defendant Wheatland, who held a chattel mortgage on the mining equipment used on the premises, took possession of this equipment under this mortgage and removed the same from the property. On May 6, 1941, Blake Wilson and D. S. Bushnell assigned their interest in the lease to a corporation which had been organized in April, 1941, with Wheatland as president and Bushnell as secretary. Immediately thereafter this corporation filed a petition in bankruptcy and in August, 1941, the trustee in bankruptcy sold its interest in the lease. There is no evidence that the limited partnership was in possession of the property or had anything to do therewith after the assignment of the lease to the corporation on May 6, 1941.

In this action which followed the plaintiffs sought to recover \$1,000 covering the four monthly payments provided for in the lease from May to August, 1941, inclusive. They also sought to recover on two book accounts for \$981.85 and \$82.39, respectively, which had been assigned to them by

third parties who had sold merchandise to the partnership. The action was brought against Blake Wilson, D. S. Bushnell, E. M. Wheatland and Warren Wilson, individually, and as general partners of the limited copartnership of "Wilson & Bushnell" and the partnership itself. The complaint alleged the assignment of the lease to Blake Wilson and D. S. Bushnell and the assumption by them of its obligations; that they went into possession on August 1, 1940, and operated as a general copartnership with themselves as sole partners until September 1, 1940; that subsequent to their taking possession and on September 1, 1940, the defendants formed a limited copartnership known as "Wilson & Bushnell", with Blake Wilson and D. S. Bushnell as general partners and E. M. Wheatland as a limited partner; that on March 10, 1941, E. M. Wheatland and Warren Wilson assumed and participated in the general management of the general copartnership and they are now and at all times have been, since the formation of the general partnership, general copartners. The court found that on March 10, 1941, the defendant Wheatland assumed and participated in the general management of this limited copartnership, that Warren Wilson did not assume or participate in any such management and that since March 10, 1941, D. S. Bushnell, E. M. Wheatland and Blake Wilson have been general copartners in the limited partnership. As a conclusion of law, the court found that the plaintiffs were entitled to a judgment against E. M. Wheatland for the amount sued for. A judgment for \$2,064.24 was entered against Wheatland alone and he has appealed.

[1] The appellant first contends that there is no evidence to support the findings that the limited partnership acquired the interest of Blake Wilson and D. S. Bushnell in this lease, that the limited partnership went into possession of the property under this mining lease, and that the limited partnership assumed and for a period of time performed the terms and conditions of the lease, including the payment of the minimum rent or royalty. While there is no evidence that this lease was ever formally assigned to the limited partnership by Blake Wilson and D. S. Bushnell the evidence clearly shows that the limited partnership, of which Blake Wilson and D. S. Bushnell were originally the general partners, entered into possession of the property early in September, 1940, and con-



tinued in such possession until about May 1, 1941, conducting mining operations thereon, and that the monthly payments required by the lease were all made from September, 1940, to and including April, 1941. So far as they are material here, these findings are sufficiently supported by the evidence.

[2] It is further urged that there is no evidence to support the finding that from and after March 10, 1941, the appellant assumed and participated in the general management of this limited copartnership. While the appellant and certain witnesses testified to the contrary there is other evidence which abundantly supports the finding insofar as his participation in the management is concerned between March 10 and May 6, 1941.

[3, 4] While it clearly appears, insofar as this appeal is concerned, that the appellant became liable as a general partner in this limited partnership on and after March 10, 1941, it does not follow that he was liable for all of the monthly payments called for by the lease between May and August, 1941. The limited partnership had not assumed or agreed to perform the obligations of the lease. The general rule is that an assignee of a lease is liable for rent only so long as he remains in possession of the property, where there is no covenant on his part to pay the rent. *Lesser v. Pomin*, 3 Cal.App.2d 117, 39 P.2d 451. The respondents rely on *Ellingson v. Walsh, O'Connor & Barneson*, 15 Cal.2d 673, 104 P.2d 507, in support of their contention that the limited partnership was liable for the monthly payments called for by this lease during the four months period here in question. While the court there held that where a limited partnership acquired the rights of an original lessee and thereafter occupied the premises and paid the rent a person who thereafter became a general partner of said limited partnership was personally liable for rent of the premises, that case involved a situation where the limited partnership was still in possession of the premises through a subtenant during the period in question, and the court further pointed out that a nonassuming assignee who occupies the premises is liable by reason of his tenancy and that his obligation arising out of privity of estate "continues at least through the period of his occupancy." It has frequently been held that an assignee of a lease who is in possession of the land but who has not as-

sumed or agreed to perform the conditions of the lease is liable for the rent so long as he remains in possession but not thereafter. *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal.2d 232, 73 P.2d 1163; *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697. The rules laid down in the latter cases are applicable here. While the appellant was liable as a general partner after March 10, 1941, the limited partnership, in which he became a general partner, had not assumed or agreed to perform the obligations of the lease and the liability of the limited partnership for the monthly payments provided for in the lease continued only so long as the limited partnership remained in possession of the premises. It clearly appears from the evidence that their possession of the premises ceased at least on May 6, 1941, when the lease was assigned to the corporation which had been formed. At that time the monthly payment called for by the lease for the month of May, 1941, was due and the appellant was liable therefor. It follows, however, from what we have said that he was not personally liable for the monthly payments which became due during the ensuing three months, during which time the limited partnership was not in possession of the premises. That portion of the judgment covering these monthly payments must, therefore, be reduced by deducting therefrom \$750 which became due after the limited partnership went out of possession of the property.

[5] In a second cause of action it was alleged that subsequent to September 1, 1940, the defendants became indebted to a certain hardware company for goods sold in the sum of \$82.39. In a third cause of action it was alleged that subsequent to August 10, 1940, the defendants became indebted to a certain lumber company for goods sold with a balance of \$981.85 remaining due. The court found all of these allegations true and also found that these amounts were owed by the appellant Wheatland. With respect to the first of these items the evidence shows that there was an open book account charged to "Wilson & Bushnell," the first item having been sold on September 17, 1940, and the last item on November 12, 1940. With respect to the lumber bill there was also an open book account charged to "Wilson & Bushnell," the first item being dated August 10, 1940 and the last item February 4, 1941. Nine payments thereon were made ranging from August 10, 1940 to February 19, 1941.

The court found that on or about March 10, 1941, the appellant Wheatland "assumed and participated in the general management of said limited co-partnership" and has since been a general copartner. The evidence sustains this finding and it follows that he was not personally liable for the amounts involved in the second and third counts, these obligations having been created prior to the time he became a general partner. Civ.Code, Sec. 2411. We can find no evidence in the record which sustains the finding that these amounts were owed by the appellant Wheatland.

The judgment is modified by reducing the same to \$250 and, as so modified, it is affirmed. Each party to pay his own costs on appeal.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 481

GEISENHOF v. MABREY et al.

No. 12265.

District Court of Appeal, First District,  
Division 1, California.

May 3, 1943.

#### 1. Appeal and error $\hookrightarrow$ 931(1)

On appeal from judgment for plaintiff, evidence was viewed most favorable to plaintiff.

#### 2. Corporations $\hookrightarrow$ 399(4)

A director and vice president of corporation constructing and operating an ice skating rink, as active head of the enterprise, did not have "implied authority" to confer upon plaintiff an interest in the business for promotional services, rendered to the enterprise.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Authority".

#### 3. Work and labor $\hookrightarrow$ 4(5)

Where plaintiff, at the express instance and request of director and vice president of corporation constructing and operating an ice skating rink, rendered promotional

services to the enterprise, directors' promise was implied that plaintiff should be paid the reasonable value of his services in the event of failure to reach an agreement for a different compensation.

#### 4. Work and labor $\hookrightarrow$ 30(4½)

A common count for the reasonable value of promotional services rendered by plaintiff for a corporation constructing and operating an ice skating rink supported recovery for the reasonable value of plaintiff's services.

#### 5. Work and labor $\hookrightarrow$ 28(4)

The trial judge, from testimony as to their nature and extent, properly determined the worth of promotional services rendered in connection with a project for construction and operation of an ice skating rink.

#### 6. Work and labor $\hookrightarrow$ 29(3)

\$3,000 as reasonable value of services requiring 90 per cent. of plaintiff's time for a six months' period in promoting an ice skating rink was not excessive.

#### 7. Partnership $\hookrightarrow$ 176, 185

Partners are liable for partnership debts without restriction of satisfaction to partnership property, subject to the rules for marshaling assets. Civ.Code, §§ 2411, 2435.

#### 8. Corporations $\hookrightarrow$ 1

Joint adventures  $\hookrightarrow$ 1

Partnership  $\hookrightarrow$ 173

Record sustained finding that individual defendants had conducted an ice skating rink as a joint venture under the name of a corporation rendering them liable as "partners" for reasonable value of promotional services rendered to the corporation. Civ.Code, §§ 2411, 2435; St.1917, p. 673.

See Words and Phrases, Permanent Edition, for all other definitions of "Partner".

#### 9. Licenses $\hookrightarrow$ 18½

The Corporate Securities Act is designed to secure a sound corporate structure for those to whom stock may be sold and for creditors. St.1917, p. 673.

#### 10. Corporations $\hookrightarrow$ 1

Partnership  $\hookrightarrow$ 224

Where articles of incorporation were filed for corporation to construct and operate an ice skating rink, and through the device of never issuing stock compliance

was avoided with restriction of permit for sale and issuance of stock prohibiting transfer of promotion shares without the consent of the corporation commissioner, transfers of interests in the project to individual defendants were regarded as transfers of interests in a "partnership" and not as transfers of corporate "stock". St. 1917, p. 673.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership" and "Stock".

#### 11. Corporations ☞ Partnership ☞178

That property of a partnership was in the name of a corporation did not place such property beyond the reach of the partnership's creditors. Civ.Code, §§ 2411, 2435.

#### 12. Partnership ☞238

Where individual defendants conducted an ice skating rink as a joint venture under the name of a corporation, the joint venture was a "partnership" as regards statute restricting satisfaction of an incoming partner's liability for partnership obligations, arising before his admission, to partnership property. Civ.Code, §§ 2411, 2435.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

Appeal from Superior Court, Santa Clara County; A. F. Bray, Judge.

Action by A. C. Geisenhoff against Charles S. Mabrey and others for the reasonable value of promotional services rendered in connection with a project for constructing and operating an ice skating rink. Judgment for plaintiff for \$3,000 after a \$2,000 remission was required, and defendants appeal.

Modified and affirmed in accordance with opinion.

Edward M. Fellows, of San Jose, and Elliott, Atkinson & Sitton, of Sacramento, for appellants.

Maurice J. Rankin and C. E. Luckhardt, both of San Jose, for respondent.

KNIGHT, Justice.

In this action the court originally made findings and entered judgment for plaintiff

for \$5,000. In denying defendants' motion for a new trial the court required plaintiff to remit \$2,000. Defendants appeal from the judgment thus reduced.

The judgment is for the reasonable value of services of a promotional nature rendered by plaintiff in connection with a project for construction and operation of an ice skating rink in San Jose. Judgment is against Ice Bowl, Inc., a corporation, and against defendants Mabrey, Hollenbeck, Streeter and Schwab. The individual defendants are directors and officers of the corporation. No stock in the corporation was ever issued. The defendants claim to be beneficial owners of the corporation's property. The court found that they operated the skating rink "as their individual enterprise and as a joint venture among themselves," but "under the name of said corporation." A principal question is as to the liability of the individual defendants.

Plaintiff was a real estate and insurance broker in San Jose with reserve status in the Navy, to which he reported for active duty as an officer on August 2, 1940. He was introduced to defendant Mabrey in January, 1940, by one Jones, also a real estate broker in San Jose. Mabrey and two others, Johnson and Hann, were interested in establishing a skating rink in San Jose. All were from Sacramento, where Mabrey and Hann were connected with an ice rink business. Jones knew that plaintiff was agent for a site in San Jose suitable for a rink.

On March 6, 1940, articles of incorporation for Ice Bowl, Inc., were filed, describing Mabrey, Johnson and Hann as incorporators. On March 12, 1940, the corporation took a three year lease on the proposed site, including an option to buy. On March 30, 1940, the Corporation Commissioner issued a permit for the sale of stock by which the corporation was authorized to sell 80,000 shares of a par value of \$1.00 each for cash at par, and as shares were sold and issued for cash to issue a like number of shares to "any or all of the following named persons: Roy Hann, Chas. S. Mabrey and Geo. W. Johnson," as "partial consideration for promotion services." The permit provided for the deposit in escrow of payments received from subscribers pending further order of the commissioner, and for deposit of the promotional shares in escrow. It further provided that there should be no sale or transfer of the promotional shares, or any interest therein, with-



out the written consent of the commissioner.

A few subscriptions for stock were taken and payments made therefor, but no stock certificates actually issued to any purchaser, nor were certificates issued for promotional stock. The permit by its terms expired on September 29, 1940. A renewal was refused in November, 1940, because it appeared that the payments made by subscribers instead of being held in escrow had been used to pay expenses. Stock subscription payments were subsequently refunded.

In April, 1940, a small structure to be used as a construction office was placed on the property. It does not appear just when work on the rink started, but it was under way in the summer of 1940. Mabrey, who was a building contractor, supervised construction. The plan apparently was to finance the building of the rink with proceeds from the sale of stock to a large number of persons. But this plan was not carried out. By June, 1940, Hann and Johnson, who were employed in a state office in Sacramento, ceased to be connected with the enterprise, for the reason that they were unable to secure capital or give time. Defendants Hollenbeck and Schwab of Sacramento, became directors in place of Hann and Johnson. Mabrey continued to be the active head of the enterprise as before. Hollenbeck made advances totalling \$18,420, for which he received notes of the corporation, the first dated June 28, 1940, for a loan of \$1,000. He also guaranteed notes of the corporation for bank loans in the amount of \$36,750, which he was called upon to pay. He testified that he was to receive 25 per cent of the promotion stock for this assistance, in addition to being repaid his advances with interest. Schwab, a Sacramento attorney, also was to receive 25 per cent of the promotion stock. What he contributed in the way of money or services does not appear. There are references to his having interested Hollenbeck.

In September, 1940, defendant Streeter became a party to the venture. He advanced in all \$27,000, under an agreement that he was to be repaid, with interest, and also to receive 25 per cent of the promotion stock. Neither Hollenbeck nor Streeter have been repaid.

The rink opened on December 23, 1940, and at the time of trial, in December, 1941, was still operating. Witnesses for defendants testified that it operated at a loss, but its financial condition was not shown in

detail. In June, 1941, there was an exercise of the option to purchase the property on which the rink was located. The lease of March 12, 1940, which included the option, had been taken in the name of the corporation, Ice Bowl, Inc. The owner of the property had placed a deed in escrow with a title insurance company, naming that company as grantee. The company, in turn, executed a deed to George A. Martinelli, one of the attorneys for the project, dated June 10, 1941. Martinelli executed a deed to the corporation, Ice Bowl, Inc., bearing the same date, which was not, however, recorded until December 27, 1941, after the present action had gone to trial.

The funds with which to pay the purchase price of \$11,000 were obtained by a loan from one Addison, in the sum of \$30,000. The balance went to discharge debts of the enterprise. Martinelli executed a note and deed of trust for the loan. Mabrey, Hollenbeck, Schwab and Streeter and their wives executed a similar note and deed of trust for the same debt. No note or deed of trust was executed in the name of the corporation. Upon the sale plaintiff received from the seller the usual five per cent real estate broker's commission, amounting to \$550.

Against this background of organization the services of plaintiff may be detailed. As noted above, plaintiff met Mabrey, Johnson and Hann in January, 1940. Sometime thereafter Mabrey importuned him to join in promoting the rink. Mabrey, Johnson and Hann were not acquainted in San Jose, and Mabrey represented, according to plaintiff, that someone was needed who was known locally and acquainted with local firms and who could interest local capital. The witness Jones also testified that Mabrey told him that the desire was to have someone with an excellent reputation in the community connected with the enterprise. Plaintiff had been a real estate and insurance broker in San Jose for fifteen years.

The rink site was zoned for residential purposes. Plaintiff was successful in obtaining a rezoning, but the trial court expressed the opinion that this service was as a real estate broker, and was compensated for by the commission he received on the exercise of the option. Plaintiff also testified that he arranged for credit for the project with the Chiem Lumber Company, San Jose Supply House, General Printing Co., and a contractor who did certain work. During the erection of the rink plaintiff's real estate office was used as a headquar-



ters. Although Mabrey was in charge of construction operations, plaintiff testified that as a rule Mabrey was in town only once or twice a week. In his absence plaintiff handled the numerous details involved in supervision of the construction, such as the payment of workmen and purchase of materials. He arranged with a contractor friend to release a foreman for the rink job. Since there was a shortage of funds at times, it was often necessary for plaintiff to deal with those who pressed for payment. He also arranged for publicity in the San Jose Mercury Herald and in the San Jose News. At the time there was a competing ice rink project under promotion. According to plaintiff, he spent ninety per cent of his time for about six months in promoting the rink.

Plaintiff did not hold a stockbroker's license and it was not contemplated that he should sell stock, but only that he should interest prospective purchasers. By reason of his efforts a Mrs. Krull subscribed for \$2,315 worth of stock and she and certain relatives were prepared to make a further investment of \$12,000. One Rampe also subscribed. It is to be inferred that efforts to interest a large number of persons were abandoned when it became apparent that it would be more feasible to finance the rink through a few individuals who could supply substantial sums. It does not appear that plaintiff would not have interested other persons had the project gone ahead as first planned. Defendants minimized plaintiff's services, but the trial court accepted his version.

Plaintiff testified that Mabrey repeatedly represented that for his services, performed at Mabrey's request, plaintiff should have an interest in the business; that he pressed Mabrey to enter into a definite agreement, but that Mabrey, while urging him to continue his services, put him off with vague promises as to what his compensation should be. In substantiation of plaintiff's testimony that he did not have, but was seeking, a definite commitment, there is in evidence a letter which he wrote to Johnson on April 7, 1940, stating that he expected to continue to do everything possible for the project, but felt it advisable that a definite agreement be worked out which would be mutually satisfactory. On April 9, plaintiff wrote to Hann and Johnson jointly, expressing the view that if he was to continue with the organization he should be compensated

with an interest in the corporation. The figure he suggested was stock in the amount of \$6,000. The letter closed with the wish that a definite commitment be made so he would know where he stood.

On May 25, 1940, Mabrey signed a writing composed by him and plaintiff jointly, on stationery of plaintiff, which is as follows:

"In consideration for the services rendered to date by A. C. Geisenhoff in the promotion of the ice skating rink known as Ice Bowl, Inc., we, the undersigned directors, agree to allot to said A. C. Geisenhoff ten per cent of the promotion stock as allowed by the corporation commissioner. It is further understood and agreed that the promotion stock is to be distributed on a basis of the effort and contribution to the success of said Ice Bowl, Inc., as rendered by the various individuals engaged in the promotion of said project.

"[Signed] Chas S. Mabrey,

"Director Vice President."

Plaintiff relies on no other written evidence of an agreement for his compensation. By this writing Mabrey does not purport to act for anyone but himself. Although the writing in terms indicates that it was to be signed by more than one, Mabrey was the only one to sign it. Plaintiff testified that it was at Mabrey's request that he did not seek other signatures. By the date of the writing, according to plaintiff, Johnson and Hann were out and Hollenbeck and Schwab were connected with the enterprise. Plaintiff also testified that the understanding with Mabrey was that whatever form the organization assumed he should have a ten per cent interest in the business.

Plaintiff also testified that he was to receive the insurance on the rink property. Policies were actually issued but were cancelled and other insurance substituted after plaintiff had gone in the Navy.

The court found that "in February, 1940" an agreement was made that plaintiff should receive for his services "an undivided 1/10 interest in said project and business and the property and profits thereof." In our analysis the plaintiff's own evidence shows that he did not have an agreement as of February, 1940, by which a definite percentage interest in the business was fixed as the measure of his compensation; that the first definite commitment was that of May 25, 1940, with de-

fendant Mabrey, by which he did not purport to bind anyone but himself.

[1-3] We are of the view that the evidence is insufficient as a matter of law to show that Johnson and Hann, or subsequently the defendants (with the possible exception of Hollenbeck) authorized or ratified an agreement that plaintiff have a ten per cent interest in the business. Mabrey's implied authority as active head of the enterprise would not be so broad as to enable him to confer on others an interest in the business which he shared with his associates. But the evidence shows beyond dispute that the promotional services were rendered at the express instance and request of Mabrey, and under such circumstances that there would be implied a promise and intent on the part of Johnson and Hann, as well as Mabrey, that plaintiff should be paid the reasonable value thereof in the event of the failure to reach an agreement for a different measure of compensation. As to Hollenbeck and Schwab also, accepting the view of the evidence most favorable to plaintiff since the judgment is in his favor, it must be held that they assented and ratified plaintiff's continued employment. That is, while the evidence is insufficient to show that defendants authorized or ratified an agreement that plaintiff have an interest in the business, it does establish that they authorized or ratified the employment of plaintiff under such circumstances that a promise to pay the reasonable value of his services will be implied.

[4] The judgment is for the reasonable value of plaintiff's services. The first count of the complaint, a common count for the reasonable value of the services, is the basis for this recovery.

[5,6] Before considering to what extent the individual defendants as well as the corporation Ice Bowl, Inc., are liable to plaintiff, the contention that there is no evidence of the value of his services may be disposed of. Defendants object that no witness testified as to that value. We are of the view that this is a situation where it was competent for the trial judge to determine the worth of the services from the testimony as to their nature and extent. *Seib v. Mitchell*, 10 Cal.App.2d 91, 52 P.2d 281; *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374; *Lundberg v. Katz*, 44 Cal. App.2d 38, 111 P.2d 917. There are types of technical service with which a judge

or jury may be too unfamiliar to make a determination without expert testimony, but the services here are not of that kind. In any event it can be said as a matter of law that the services were of the reasonable value of at least \$3,000, to which the court reduced the judgment.

If, as held by the trial court, the defendants were conducting the business as "their individual enterprise and as a joint venture," but "under the name of said corporation," then the individual liability of Hollenbeck, Schwab and Streeter for the reasonable value of plaintiff's services performed before they became associated with the enterprise is governed by section 2411, Civil Code, as follows: "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property." See also section 2435, Civil Code. The joint venture, if one exists, is, on the facts of this case, a partnership as regards section 2411.

[7] Whatever the effect of the statements made by Hollenbeck to plaintiff and the witness Fuller as to Mabrey's authority to act for him, they cannot be construed as an assent that his liability for plaintiff's services prior to Hollenbeck's connection should be satisfied out of his individual property. The liability of the individual defendants for debts arising *after* their association with the business is governed by the usual rule that partners are liable for partnership debts without restriction of satisfaction to partnership property, subject to the rules for marshaling assets.

[8] We are of the view that the trial court's finding that the individual defendants conducted the rink business "as their individual enterprise and as a joint venture among themselves" under the name of the corporation is supported by the record. We have adverted to the fact that no stock in the corporation was ever issued. The corporation came into existence on March 6, 1940, with the filing of its articles of incorporation. We do not hold that the issuance of stock is a requisite to corporate existence, or in all cases to freedom from individual liability. See note, 50 A.L.R. 1030. But in the case herein the evidence shows that although a permit for the sale and issuance of stock was granted on

March 30, 1940, no stock had been issued at the time of trial in December, 1941. It appears that a few subscriptions for stock were taken and the purchase price received. Under the permit the proceeds were required to be held in escrow pending further order of the Corporation Commissioner, although the stock issued for cash was not required to be held in escrow. The evidence shows that no shares were issued and that the proceeds from the stock subscriptions were used to pay expenses. The purchase price was subsequently refunded to subscribers.

The permit provided for the issue of promoters' shares to Mabrey, Johnson and Hann equal to the number of shares sold for cash, and that such shares should be held in escrow pending further order of the commissioner. It further provided that there should be no sale or transfer of promoters' "shares, or any interest therein," without the written consent of the commissioner. The permit expired September 29, 1940. An application for renewal was denied on November 7, 1940, and no permit has been issued since. There was testimony that a permit could not be obtained while this action and two others for services were pending.

[9,10] The Corporate Securities Act, St.1917, p. 673, is designed to secure a sound corporate structure not only for the benefit of those to whom stock may be sold, but also for creditors. *People v. Kuder*, 98 Cal.App. 206, 216, 276 P. 578. The provisions of the permit as to holding proceeds from the sale of stock in escrow, limiting the issue of promotion shares to the number of shares sold for cash, and prohibiting the transfer of promotion shares without the consent of the commissioner were designed to accomplish that purpose. The objects of the act would be circumvented if those who own the beneficial interest in a project could secure freedom from individual liability for themselves, and for those to whom they transfer interest in the venture, while at the same time avoiding compliance with the permit restrictions through the device of never issuing stock. While the corporation herein continued to exist as an entity and received a deed to the rink property and signed notes for loans, those manag-

ing the business cannot claim immunity from individual liability when the corporate structure over a period of almost twenty-one months had not been completed by the issue of stock. The transfers of 25 per cent interests in the project to Hollenbeck, Schwab and Streeter will not be viewed as stock in the corporation, using that term as applicable to an interest in the business, rather than as applying merely to the certificates, in view of the fact that under the permit there was no right to transfer stock to them. Defendants have at all times maintained they each have 25 per cent interests in the business, which interests they could not have lawfully if they represent stock ownership in a corporation. In the circumstances agreements as to their interests will be regarded as transfers of interests in a business in the profits and losses of which they were to share as partners, and in which their liability is as partners.

[11] The judgment is also against Ice Bowl, Inc., a corporation, which holds title to the property of the enterprise, including the rink. That property, obviously, is not placed beyond reach of creditors of the partnership because it is in the name of the corporation.

[12] As to the corporation and Mabrey the judgment is affirmed. Mabrey has been associated with the enterprise at all times. As to Streeter, the judgment is modified by restricting satisfaction to partnership property, including property held in the name of the corporation, and as thus modified is affirmed. Plaintiff had finished his services before Streeter joined the venture. As to Hollenbeck and Schwab, the judgment is affirmed insofar as it determines the total amount of their liability. But as to them the trial court is directed to ascertain what portion of the award of \$3,000 is for services performed prior to the time of their connection with the business, and thereupon to modify the judgment by providing as to each that his liability for such part of the \$3,000 award shall be satisfied only out of partnership property, including property in the name of the corporation. The respondent shall recover costs on appeal against all defendants.

PETERS, P. J., and WARD, J., concur.



58 Cal.App.2d 549

**RIDLEY v. PELLETIER (two cases).**

Civ. 13815, 13851.

District Court of Appeal, Second District,  
Division 3, California.

May 10, 1943.

**1. Contracts ☞322(3)**

In action for money loaned and liquidated damages for breaches of contracts to handle oils, greases and gasolines, distributed by plaintiff, at defendant's service station, evidence *held* to support trial court's findings that defendant abandoned and repudiated contracts, contracted with corporation competing with plaintiff to handle its products exclusively, and failed to maintain on its premises agreed number of plaintiff's pumps.

**2. Appeal and error ☞907(3)**

On appeal on judgment roll alone, appellant is in no position to contend that trial court's fact finding was without support in evidence.

**3. Appeal and error ☞907(2)**

In action for breach of contract, where evidence before trial court is not before appellate court, it cannot inquire whether trial court's interpretation of contract was unreasonable or inconsistent with parties' intentions.

**4. Appeal and error ☞907(3)**

In action for breach of contract, appellate court, on appeal on judgment roll alone from judgment for plaintiff in less than amount sued for, cannot assume that there was no extrinsic evidence on question of extent of defendant's obligation, as all intentions are in favor of correctness of trial court's findings and judgment.

**5. Appeal and error ☞907(3)**

In action for breach of contract, trial court's findings on conflicting evidence that defendant paid plaintiff portion of amount sued for are controlling on plaintiff's appeal on judgment roll alone from judgment awarding him less than amount sued for.

price of goods, moneys paid by plaintiff for defendant's use, and money loaned to defendant by plaintiff. From a judgment for plaintiff in less than the amount sued for, both parties appeal.

Affirmed.

Carson B. Hubbard and Austin Clapp, both of Huntington Park, for appellant and respondent C. E. Ridley.

Will H. Winston, of Long Beach, for respondent and appellant A. R. Pelletier.

SHINN, Acting Presiding Justice.

C. E. Ridley sued A. R. Pelletier for money and in a trial before the court was awarded judgment of \$1,232.01. Pelletier has appealed because he thinks the judgment should have gone in his favor; Ridley has appealed because he thinks it was for too little. From a study of the briefs and the two records upon which the appeals are separately presented, we have concluded that neither appeal is meritorious and that the judgment should be affirmed as rendered.

In the first cause of action of the amended complaint plaintiff alleged that he had sold goods to and had paid out moneys at the request and for the use of defendant in the sum of \$1,943.33, of which the sum of \$1,432.28 remained unpaid.

The court found that defendant did owe this sum at the time of the commencement of the action but that he had paid the same to plaintiff on October 22, 1941, some 13 days after the filing of the complaint. By the judgment plaintiff was awarded \$5.29 interest on this cause of action.

In the second cause of action it was alleged that plaintiff had loaned defendant the sum of \$300 on June 24, 1940. The court found that this sum had been repaid on October 22, 1941, and awarded plaintiff judgment for \$16.50 as interest and \$47.47 as attorney's fees.

The third cause of action alleged that plaintiff had loaned to defendant \$830 and that only the sum of \$70 had been repaid. It set out a contract which recited the making of the loan and which contained a provision for the payment to plaintiff of liquidated damages in the event defendant failed to perform certain obligations which he assumed by the contract, and attorney's fees in case of suit. The court found that after the commencement of the action defendant paid plaintiff an additional \$207. Plaintiff was awarded the sum of 77 cents as interest, \$1,020 as liquidated damages,

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Appeals from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by C. E. Ridley against A. R. Pelletier for a balance due on the purchase



and \$184.16 as attorney's fees upon this cause of action.

The fourth cause of action alleged a loan by plaintiff to defendant of \$150.55, set out an agreement similar to the one contained in the third cause of action, and the prayer was for judgment in the amount of the loan, for liquidated damages, for interest and attorney's fees. The court found that the sum of \$150.55 had been repaid after the commencement of the action and that plaintiff was entitled to judgment on this cause of action for \$424 as liquidated damages, for which judgment was given, together with \$86.26 as attorney's fees and 56 cents as interest.

The court also made a further finding that in addition to the amounts paid, as hereinbefore recited, defendant had paid to plaintiff after the commencement of the action the further sum of \$553 (note: this is the amount of the difference between the sum of \$830 alleged to have been loaned to defendant in the third cause of action, and the sum of \$277 which the court had already found had been received by plaintiff upon account of the loan).

We will first consider the appeal of defendant. Mention has been made of two items of \$1,020 and \$424 awarded as liquidated damages, which are the only items now questioned by defendant. He contends that there was no evidence to sustain the court's finding that he had breached the contracts set out in the third and fourth causes of action, without which breach he could not have been held liable for liquidated damages. Conceding that the judgment is correct except for the allowance of liquidated damages, he says in his opening brief that "appellant respectfully submits that the judgment of the trial court should be modified by eliminating therefrom the two amounts of damages allowed on the third cause of action and the fourth cause of action in the sum of \$1,020.00 and \$425.00, respectively, and the balance on the remaining part of the judgment should be affirmed." Deduction of \$1,425 from \$1,232.01 would leave a minus quantity which might represent money coming to defendant, but he makes no point of this and it is immaterial in view of the fact that the judgment is to be affirmed. The agreements set out in the third and fourth causes of action were entered into between plaintiff and defendant and were dated, respectively, July 19, 1940, and October 1, 1940. On those dates plaintiff was a distributor

of Macmillan oils, greases, and gasoline. Defendant was proprietor of a service station and under the first agreement obligated himself to handle Macmillan products. In material parts the agreement provided as follows:

"Whereas, first party desires to promote the advertising of and sale of, and to increase the goodwill of the public towards Macmillan oils, greases and gasolines, and toward Macmillan Petroleum Corporation;

"Now, Therefore, first party agrees to lend to second party the sum of \$830.00, to be used by second party to improve the said premises in the following particulars:

"Pave lot, Raise Hoist, Install Cement Slab for wash rack, Install tank, Pumps, etc.,

"As consideration for said loan, and to carry out the desires of both parties, second party agrees;

"1. To expend the moneys loaned for the purposes above specified, and to feature and promote the use and sale of Macmillan products.

"2. To maintain signs upon said premises, advertising Macmillan oils, greases and gasolines, and to maintain at least Three pumps for the sale of Macmillan gasolines; to do these things for a period of five years from the date hereof.

"3. To repay to first party the sum of \$277.00 loaned by first party, in installments as follows: \$5.00 on the 15th day of each calendar month thereafter, until said sum of \$277.00 shall have been paid in full, without interest, except as hereinafter provided;

"4. To pay interest at the rate of seven per cent (7%) per annum upon all sums not paid when due, from the due date thereof to the date of full payment thereof.

"5. That should second party fail to perform any of the obligations hereby agreed by second party to be performed, in that event, first party may, at his option declare the whole balance of said loan immediately due and payable;

"6. That should action be commenced upon this contract, he will pay to first party without demand, a reasonable sum as and for an attorney's fee; this provision shall be effective each time action is commenced hereon;

"7. That should second party fail to perform the obligations of paragraph 2, second party will pay to first party the sum of \$5.00 per week, for each week during which

second party shall fail to perform said obligations, it being agreed that that is a reasonable amount to be recovered by first party as liquidated damages for each week's default; it being further agreed by the parties that it would be impracticable or extremely difficult to fix the actual damage which will accrue to first party by second party's failure to perform said obligations; these damages may be recovered week by week, as they accrue."

The second agreement was for a loan of \$150.55 to defendant for the improvement of his business premises; he agreed to repay the amount in installments, and his obligations with respect to the promotion, use and sale of Macmillan products and to maintain pumps were similar to those expressed in the first contract. A penalty of \$2 per week was stipulated as plaintiff's agreed damages in case of violation of the agreement by defendant.

[1] The court found that defendant about September 1, 1941, abandoned and repudiated his agreement of July 9, 1940, and entered into an agreement with General Petroleum Corporation to feature its products, and to handle them exclusively; that he failed to maintain three Macmillan pumps on the premises and that he declared to plaintiff that he would not further carry out any provisions of the agreement. A like finding was made with reference to defendant's breach of the agreement set out in the fourth cause of action.

Defendant's contention that the evidence did not support these findings is wholly without merit. Defendant was not obliged by the agreement to handle Macmillan products exclusively. He had three Macmillan pumps, one of General Petroleum gas and four others from which he sold gasoline of other companies. Shortly prior to the 1st of September, 1941, he made an agreement to put in three General Petroleum pumps and to feature products of that company. Under this agreement he was to transfer his lease to General Petroleum and receive back a sublease and was also to receive a substantial consideration in a sum of money to be advanced. He was to give a chattel mortgage on his premises, he gave notice of his intention to execute such a mortgage, and entered into an escrow agreement with General Petroleum. He installed two additional pumps for General Petroleum gasoline and discontinued the use of one of the Macmillan pumps. During the month of September, while his deal

with General Petroleum was pending, his purchases of Macmillan gasoline dropped from a monthly average since the beginning of the year of 8,758 gallons to 2,500 gallons. During this period he urged customers who asked for Macmillan gas to try General Petroleum products. It is true that General Petroleum withdrew from the agreement subsequent to the commencement of plaintiff's action, but the same contract was made with the branch manager of General Petroleum, acting as an individual, and he advanced to or paid defendant \$7,481 for an assignment of defendant's lease on the station. This money had been advanced by General Petroleum to its branch manager, enabling him to make the deal. Defendant gave his note to General Petroleum in that amount. Defendant also stated to plaintiff at about this time that he had entered into an agreement with General Petroleum to feature its products and he endeavored to negotiate with plaintiff a settlement of any claims which the latter might have by reason of their said two contracts.

Not only was the evidence ample to sustain the findings as to defendant's breach of the agreements, but much of the material testimony to sustain these findings came from the defendant himself. We do not see how the court could have found otherwise than it did.

No criticism is directed toward those provisions of the judgment which awarded liquidated damages and attorney's fees and there has been no occasion for us to do more than satisfy ourselves as to the sufficiency of the evidence to sustain the findings that defendant failed to live up to his agreements. Defendant has shown no cause for reversal or modification of the judgment.

We now come to the appeal of plaintiff. This is presented upon the judgment roll. The sole contention is that the court misconstrued the agreement set out in the third cause of action, in that, as it is contended, it was held that defendant was obliged to repay to plaintiff not more than \$277 and interest of the loan of \$830, even though he failed to perform his obligations under the agreement. It is contended that when defendant violated his agreement he immediately became obligated to repay the unpaid part of the loan of \$830, and that the court therefore erroneously limited his liability on the loan to \$277. It is true that the court found that "on the 22nd day of

October, 1941, the defendant paid to the plaintiff the sum of Two Hundred Seven Dollars (\$207.00), the balance of the loan agreed by defendant to be paid to plaintiff under the terms of the contract entered into by them, and it is true that no part of the interest accruing on said sum of Two Hundred Seven Dollars (\$207.00) from the 4th day of October, 1941, to and including the 22nd day of October, 1941, has been paid." But in addition to this somewhat enigmatical finding the court also found, as stated in our treatment of defendant's appeal, that defendant, on October 22, 1941, had paid the further sum of \$553, which makes up the total of \$830.

[2] In order to avoid repetition, we refer to the figures set out in the beginning of our opinion. The sum of defendant's liabilities under the several causes of action as found by the court, after deducting all credits excepting the sum of \$553, amounted to \$1,785.01; deducting from this amount the sum of \$553 gives the amount of the judgment, \$1,232.01. There is no finding that defendant was required to pay only \$277 of the \$830 loan; there is a finding that he paid defendant \$553 in addition to the \$277. Plaintiff is in no position to contend that this finding was without support in the evidence, since the appeal is upon the judgment roll alone. From the record before us it appears that defendant has liquidated all of his obligations to plaintiff with the exception of the amount of \$1,232.01, for which plaintiff was given judgment.

[3-5] Furthermore, if it should be assumed, as plaintiff contends, that the court did construe the agreement as requiring the repayment of only \$277, even in the event of defendant's default or breach of the contracts, that conclusion would have been reached after a consideration of all of the evidence which was before the court and which could properly have been considered in arriving at the intention of the parties. Undoubtedly there was room for a difference of opinion as to the extent of defendant's obligation to repay. Extrinsic evidence bearing upon that question might have been quite helpful to the court in determining what the parties understood the obligation to be. Without the evidence before us which was before the trial court we could not undertake to inquire whether the interpretation given the agreement was unreasonable or inconsistent with the intentions of the parties. Counsel are in

sharp disagreement as to whether there was such extrinsic evidence. We cannot assume that there was none where all intentions are in favor of the correctness of the findings and judgment. Moreover, if the entire evidence were before us we would have to make an independent study of it, unaided by anything presented in the briefs, which are devoted to a discussion of the findings. Under these circumstances we would accept the trial court's construction of the agreement. But as we say, the findings are to the effect, not that defendant did not owe the amount of \$553 in addition to the \$277, but that he had paid it, and these findings are controlling upon plaintiff's appeal.

The judgment is affirmed upon each appeal.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.



58 Cal.App.2d 491

RECLAMATION DIST. NO. 1500 et al. v.  
RAUB, County Treasurer.

Civ. 6946.

District Court of Appeal, Third District,  
California.

May 3, 1943.

Hearing Denied July 1, 1943.

#### 1. Waters and water courses ¶222

Under statute authorizing trustees of reclamation district to lease or sell lands acquired by district for unpaid assessments, trustees were authorized to lease such lands for oil and gas purposes. Pol.Code, §§ 3454, subd. 10, 3466a, as amended by St. 1939, p. 1390.

#### 2. Waters and water districts ¶222

That "oil and gas lease" differs from ordinary lease in that right of lessee under oil and gas lease extends to extraction of a part of the substance of the land itself and that object of such contract is in effect the sale of part of the land did not deprive trustees of reclamation district of authority to enter into an oil and gas lease, where trustees had further right to sell the land.



Pol.Code, §§ 3454, subd. 10, 3466a, as amended by St.1939, p. 1390.

See Words and Phrases, Permanent Edition, for all other definitions of "Oil and Gas Lease".

### 3. Waters and water courses ☞222

Authority of trustees of reclamation district to enter into oil and gas lease on land acquired through unpaid assessments and conveyed to county treasurer as trustee of bond fund, would not be denied on ground that execution of lease would in some manner affect bonds issued by district, where bondholders interposed no objection to the lease. Pol.Code, §§ 3453, 3454, subd. 10, 3466a, as amended by St.1939, p. 1390.

### 4. Pleading ☞87, 214(3)

In action by trustees of reclamation district against county treasurer to compel treasurer to execute oil and gas lease on lands conveyed to him as trustee for bond fund, truth of allegations in petition that execution of proposed lease was favorable to district, landowners and bondholders was admitted by respondent's demurrer, and any other objections to execution of lease should have been raised by way of answer to petition. Pol.Code, §§ 3453, 3454, subd. 10, 3466a, as amended by St.1939, p. 1390.

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Original application for writ of mandate by the Reclamation District No. 1500 and others against Gerald F. Raub, County Treasurer of Sutter County, to compel respondent to execute a certain oil and gas lease on land conveyed to him as trustee of the bond fund and of the district. Respondent filed a demurrer to the petition.

Demurrer overruled and peremptory writ granted.

Downey, Brand & Seymour, of Sacramento, for petitioners.

Lloyd E. Hewitt, of Yuba City, for respondent.

ADAMS, Presiding Justice.

Plaintiffs made an original application to this court for a writ of mandate to compel the respondent, County Treasurer of Sutter County, to execute a certain oil and gas lease on land conveyed to him as trustee of the Bond Fund and of the district. An alternative writ issued. Respondent has interposed a general demurrer to the petition.

The lands involved belong to the district, as they were sold to the county treasurer for delinquent assessments under the bond issue of the district; and time for redemption has expired. The board of trustees has elected to lease the lands under what is known as a community oil and gas lease, and has passed a resolution requesting respondent to execute the lease. Respondent has refused on the sole ground that section 3466a of the Political Code does not authorize the making of such a lease, the lands being agricultural lands situated wholly within an agricultural community in which no oil or gas field has been developed. He does not question the authority of the trustees to lease the lands for agricultural purposes, but questions their right to lease for other than agricultural purposes.

[1] Section 3453 of the Political Code provides that the board of trustees of a reclamation district constitutes the board "for the management of the affairs therein." Section 3454 of said code defines the powers and duties of said board of trustees; and subdivision 10 thereof authorizes them "To sell, convey, transfer, lease to others or otherwise dispose of such real or personal property belonging to the said district which said board of trustees shall find no longer necessary for the construction, maintenance or operation of the works of reclamation of said district \* \* \*." Section 3466a of said code, as amended by St.1939, p. 1390, contains a provision reading:

"After the lapse of one year from and after the expiration of the period of redemption of any land sold to the district, or county treasurer as trustee for the district, either pursuant to the provisions of sections 3466, 3480 or section 3480a of this code, the county treasurer of the main county, when and as directed by the board of trustees of the district, may in their discretion then sell the whole or any part of any tract of land remaining unsold to the highest bidder for cash \* \* \*."

Also:

"The trustees of the district shall have the management and control of, and right to lease out to a tenant or tenants for such reasonable rental and upon such terms as such trustees may deem advisable, any and all lands in the district which have been sold to the county treasurer, as trustee, for delinquent assessments, where the time for redemption has expired and said lands

remain unsold and to receive and collect the rental for the same."

The foregoing sections, then, authorize the trustees of a reclamation district, either to lease or to sell lands such as are involved in this proceeding. The purposes for which they may lease or sell are without restriction, and we are convinced that the trustees are, therefore, authorized to lease such lands for oil and gas purposes.

Respondent's sole reliance is upon *Stone v. City of Los Angeles*, 114 Cal.App. 192, 299 P. 838, 839, wherein it was held that defendant city was without authority to lease for the drilling for oil and gas, tide and submerged lands which had been granted to it by the state. The grant there provided, however, that the lands should be used by the city solely for the establishment, improvement and conduct of a harbor, and for the construction of wharves, docks, piers, etc., necessary or convenient for the promotion and accommodation of commerce and navigation; and the city was specifically forbidden to grant, convey, give or alien said lands to any individual, firm or corporation for any purpose whatsoever. It was, however, authorized to grant franchises for a limited period for wharves and other public uses, and to lease for a limited period "for purposes consistent with the trust upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor. \* \* \*" The court there held that an oil and gas lease differs from an ordinary lease; that the lessee of oil land has a different and greater interest in the property than is given by the ordinary usufructuary lease, in that the right of a lessee under an oil and gas lease extends to the extraction of a certain part of the substance of the land itself and its removal and conversion; and that the object of such a contract is, in effect, if not technically, a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof. The court also said that at the time of the grant oil had not been discovered in the vicinity of the lands sought to be leased, and that the Legislature, in giving the right to lease, did not have in mind that the property should be leased for any purposes other than those incident to the development of a harbor; and that this conclusion was strengthened by the clause in the granting act prohibiting alienation of the lands.

[2] We find nothing in that decision supporting respondent's contention herein. The lands which petitioners propose to lease they are authorized to sell. Therefore, whether an oil and gas lease does or does not effect the conveyance of a part of the land itself, or a greater interest in the property than is conveyed by the ordinary usufructuary lease, is unimportant. No question is raised as to the terms of the proposed lease, or that it would not be beneficial to the district and its bondholders. And as to the argument that leasing of such lands for the extraction of oil and gas is not authorized because it was not within the contemplation of the Legislature that it might be leased for such purposes, and that the Legislature contemplated that it should be leased only for agricultural purposes, we find nothing in the statutes suggesting any such limitation. Conceding that the lands are primarily agricultural lands, if they were sold outright no such limitation upon their use could be imposed upon the buyer.

In *Williams v. McKenzie*, 203 Ky. 376, 262 S.W. 598, 601, where property was conveyed to a school district with a provision that it should revert to the grantor when no longer used for common school purposes, it was held that the district had a right to execute an oil lease on the land, as it was still being used for such school purposes. The court said that the grant placed the unlimited and unrestricted use of the property in the grantees until such time as, if ever, the event happened which would terminate the estate conveyed, and that such estate carried with it the unlimited right to use and control the property before the happening of the event. It also said that under the statutes of Kentucky the board of school trustees had authority to "take, hold and dispose of real and personal estate for the maintenance, use and benefit of the common school of their district", and that if such trustees had the right to hold and dispose of real estate they were authorized, in the interest of education, to execute a lease upon such school property for the extraction of oil and gas, especially because, oil and gas being fugacious, adjoining landowners might otherwise benefit at the expense of the district.

As to the decision in *Stone v. City of Los Angeles*, supra, the Supreme Court decided in *City of Long Beach v. Marshall*, 11 Cal.2d 609, 82 P.2d 362, that plaintiff city was authorized to drill for oil on tide and

submerged lands which it had acquired by grant from the state in trust for harbor purposes and upon express condition that they should be used solely for such purposes, holding that the municipality had acquired a fee simple title, had become the owner of the minerals therein, and that there was nothing in the grant which purported to deny to it the right to extract them. To be sure, in that case the court pointed out that the charter of the city authorized it to drill for and extract oil from its tidelands; but it also pointed out that the conclusion reached in the Stone case that an oil lease is an unlawful transfer of tidelands, is contrary to the holding in the later case of *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797.

[3] At the close of his argument before this court it was suggested by counsel for respondent that the execution of the proposed lease would, in some manner not stated, affect the bonds issued by the district, which bonds were issued before the enactment of section 3466a of the Political Code. However, the bondholders have interposed no objection to said lease, and, though at the conclusion of the argument, at the suggestion of counsel, this court allowed twenty days within which said bondholders might file briefs in opposition to the writ, we were thereafter advised that they did not desire to appear in the proceeding; and they have filed no briefs.

[4] The petition before us alleges that the sole ground upon which respondent refuses to execute the proposed lease is that section 3466a does not authorize the making of such lease; and in his points and authorities in support of his demurrer counsel for respondent agrees that whether or not said section gives such authority is the sole point to be determined. Also the petition alleges "That said lease, if consummated, will produce substantial additional revenue for the District bond fund over and above what would be produced if said lands were leased or rented solely for agricultural purposes and will increase the sale value of said lands. That said lease will not in any degree detract from the value or use of said lands for agricultural purposes. That said lease is to the benefit and best interests of the District and the bondholders thereof. That it is customary in the Sacramento and San Joaquin valleys and elsewhere in the State of California where such leases are obtainable, to lease agricultural lands under community oil and

gas leases. That the form lease hereto attached is exceptionally favorable to the lessor District and the landowners and bondholders thereof." The truth of this allegation is admitted by the demurrer of respondent. Any other objections should have been raised by way of answer to the petition. However, it was agreed by counsel for respondent at the argument that if his demurrer were overruled the writ might issue.

The demurrer is overruled and a peremptory writ will issue.

PEEK and THOMPSON, JJ., concurred.



58 Cal.App.2d 468

PEOPLE v. URRUTIA.

Cr. 1819.

District Court of Appeal, Third District,  
California.

April 30, 1943.

#### 1. Criminal law ☞304(2)

It is common knowledge that a knife, when used as an instrument with which to stab or cut a human being, is a "deadly weapon". Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Deadly Weapon".

#### 2. Assault and battery ☞92

The nature of prosecuting witness' wound, together with direct testimony of prosecuting witness and corroborating witnesses positively establishing fact of the assault, was sufficient to prove that assault was committed with a deadly weapon, even if there had been no direct testimony that a knife was seen in defendant's hand. Pen. Code, § 245.

#### 3. Criminal law ☞1170½(1)

Where defendant illustrated complaint that he was prevented from having a fair trial by "repeated leading questions" by citing part of testimony of prosecuting witness which showed that, upon witness stating that he felt somebody touch his hip pocket, district attorney asked "That is,



your left pocket?" and amplified complaint by statement that there were many such questions and answers, without directing attention to other alleged errors, complaint was insufficient to justify a reversal of conviction.

#### 4. Witnesses ⇨226, 240(2)

The examination of a witness or manner of such examination, particularly as to form of question, is a matter committed to discretion of trial court, which must determine whether leading questions should be allowed in examination of a particular witness from all of the circumstances present and under its immediate observation.

#### 5. Criminal law ⇨1153(4)

It is only where it clearly appears that trial court has abused its discretion in allowance of questions, either leading or suggestive, in form in which they were propounded that District Court of Appeal would be authorized to disturb verdict, particularly where witnesses are unfamiliar with English language.

#### 6. Criminal law ⇨1159(3)

Where evidence, when viewed in light most favorable to defendant, failed to establish impeachment of witnesses for prosecution but at most created a simple conflict in evidence, question of reasonable doubt as to defendant's guilt was for jury, and could not be determined by District Court of Appeal. Code Civ.Proc. §§ 1847, 2061.

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Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Antonio Urrutia was convicted of an assault with a deadly weapon, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The defendant was charged with the crime of assault with a deadly weapon with the intent to commit murder. There were two trials; at the first, the jury, being unable to reach a verdict, was dismissed; at the second, the defendant was convicted of the crime of assault with a deadly weapon. His motion for a new trial was denied and

he was sentenced to the state penitentiary. He now appeals to this court both from the order denying the motion and from the judgment, particularly citing as error the insufficiency of the evidence to support the judgment and the action of the trial court in permitting certain questions and answers.

Jose Guitterez, the victim of the assault, was a farm labor contractor, and had been so engaged for a number of years. Shortly after the hour of 11 o'clock on the evening of Sunday, August 16, he visited a saloon named Neocha da Rhomba, in the city of Sacramento, for the purpose of assembling his laborers. His testimony was to the effect that as he entered the saloon he felt some one put a hand on his hip pocket; that he quickly turned and saw the defendant; that he grabbed the defendant and struck him, knocking him to the floor; that while he was thus engaged an unidentified man struck him from behind, cutting his back; that he turned to face his rear attacker; that then the defendant stood up on one knee and "cut him in the stomach"; that he was taken to the hospital and remained there for nine days.

The barkeeper testified substantially to the same effect, and that he saw the defendant partially arise from the floor on one knee and "cut" Guitterez "in the front."

Another witness testified that he saw substantially the same events and that he saw defendant "cut" Guitterez "with a knife."

A policeman who was called to the scene found Guitterez "cut pretty badly."

The owner of the La Favorita saloon, located near the scene of the assault, testified that the defendant, with a companion, was in her place of business shortly before 11 o'clock on the evening in question; that he acted in a noisy and belligerent manner arguing with another customer; that he had a knife in his hand, which she told him to put away.

Dr. Frank L. Russell, the attending physician, testified that he examined the victim at the County Hospital; that he observed "two bad lacerations on his body, apparently made with some sharp instrument"; that "from the appearance of the wound a sharp instrument of some sort was used to make the cut," and that it was possible a knife was used. Dr. Russell further testified that the wound in front was approximately twelve inches long; it

passed underneath the skin and through the muscle; that it did not penetrate the abdominal cavity; that a person so cut would hemorrhage considerably and a considerable quantity of blood would be lost.

The defendant categorically denied most of the evidence of the people's witnesses, and rested his case on such denials.

The defendant maintains that since no weapon was found nor introduced in evidence there is no proof that the wounds were inflicted by a deadly weapon. That "the only evidence as to the character of the weapon is found in the nature of the wound" according to the testimony of the attending physician.

It is true the record does contain other testimony contradictory to that which has been mentioned. The effect, therefore, of such contradiction was to present a conflict on such question to the jury for its determination as the sole judge of the value thereof, and as a result of its deliberations it decided against the defendant.

To substantiate his contention appellant cites but two cases, *People v. Stevens*, 15 Cal.App. 294, 114 P. 800, and *People v. Valliere*, 123 Cal. 576, 577, 56 P. 433, 434. In neither case is support found for such contention. In fact in the first case cited we find the following statement: "That a deadly weapon was employed is established by the physician's testimony \* \* \*; that they [the wounds] were of such character as might have been caused by the use of a sharp instrument and were so located that death might have ensued." Likewise, in the second case, the court stated: "The testimony of Dr. Gates would seem to show that whether the instrument used was such as would likely produce death depends upon the manner of its use and the portion of the body upon which it was used, and therefore it becomes a mixed question of law and fact, which the jury must determine \* \* \*."

In the present case several witnesses testified that the defendant either "cut" the victim or "cut him with a knife" or that the cut was apparently made with a "sharp instrument."

[1] Section 245 of the Penal Code does not define a "deadly weapon" but this court previously has stated in the case of *People v. Caberera*, 104 Cal.App. 414, 415, 286 P. 176, 177, that "it is a matter of common knowledge that a knife, when used as an instrument with which to stab or cut a human being, is a deadly weapon." The

court also held in the same case there was no error in failing to instruct the jury as to what constituted a deadly weapon.

[2] The testimony of the witness and the corroborating witnesses positively establishes the fact of the assault. The nature of the wound together with the direct testimony was sufficient to prove that the assault was committed with a deadly weapon, even if there had been no direct testimony that a knife was seen in the hand of the defendant. *People v. Guiterrez*, 140 Cal.App. 720, 35 P.2d 1046.

In view of this testimony and the determination by the jury of the questions of fact so presented we cannot say as a matter of law that its conclusion was wrong or that the verdict was not justified by the evidence.

[3] The appellant further contends that the main convincing evidence against him was elicited by "repeated leading questions" and thus he was "prevented from having a fair and impartial trial." As illustrative of the objectionable questions and answers he cites a part of the testimony of Guiterrez, which we have quoted in full, as follows:

"A. I felt there that somebody touched my pocket, my hip pocket.

"Mr. Lavelle: Q. That is, your left pocket?

"Mr. Foote: Just a minute, I would ask that the reporter read that answer. (Reporter reads answer last given.)

"Mr. Foote: I would suggest that the district attorney don't put words in the witness's mouth. He is saying he put his hands in that pocket.

"The Court: Objection overruled—it was the left hip pocket?

"A. Yes sir, hip pocket."

The defendant amplifies his complaint by the statement that "there were many such questions and answers," although he fails to direct our attention to such other alleged errors, nor has defendant shown how, if at all, he was thereby prevented from having a fair and impartial trial. In view of such a meager showing this court cannot, as a matter of law, say that such questions and answers present error sufficient to justify a reversal of the judgment of the trial court. A showing decidedly more substantial than is presented on this appeal is an obvious necessity.

[4,5] Without delving at length into the innumerable citations upon the problem

**BORO et al. v. RUZICH.**

No. 13949.

District Court of Appeal, Second District,  
Division 1, California.

May 7, 1943.

of leading questions and answers suffice it to say that the examination of a witness in the trial of a case or the manner of such examination, particularly as to the form of the question, is a matter committed to the sound discretion of the trial court, which must determine whether or not leading questions should be allowed in the examination of a particular witness from all of the circumstances present and under its immediate observation. It is only where it clearly appears that the court has abused its discretion in the allowance of questions, either leading or suggestive, in the form in which they are propounded that this court would be authorized to disturb the verdict. Particularly is this true with witnesses unfamiliar with the English language. *People v. Gregory*, 8 Cal.App. 738, 97 P. 912; *People v. Clary*, 72 Cal. 59, 13 P. 77; 27 Cal.Jur. p. 80.

In the present case we have testimony produced almost entirely through the medium of an interpreter.

[6] Lastly, defendant contends that the witnesses for the prosecution were impeached in many instances, and that "without pointing out these matters in detail we ask the court to consider the record carefully and we feel certain that a reasonable doubt as to defendant's guilt will be raised in the minds of the court." We have heeded defendant's suggestion and have considered the record carefully. Viewing the record and the evidence contained therein in a light most favorable to defendant we find nothing more than a simple conflict in the evidence, something far short of impeachment. "A witness is presumed to speak the truth. \* \* \* the jury are the exclusive judges of his credibility," (Code Civ.Proc. § 1847) and "are the judges of the effect or value of evidence addressed to them, \* \* \* and when the evidence is contradictory \* \* \* guilt must be established beyond reasonable doubt." (Code Civ.Proc. § 2061.)

We therefore find no merit in the contentions of defendant. The jury saw the witnesses and heard their testimony. The question of reasonable doubt is not for this court to decide. The jury by its verdict resolved that question against the defendant.

The judgment and order are affirmed.

THOMPSON, J., and ADAMS, P. J.,  
concurring.

**1. Appeal and error ⇨544(2)**

Where trial court specifically found that at time of agreement to sell realty, consideration named in agreement was adequate, defendant vendor could not on appeal on judgment roll raise contention that complaint seeking specific performance of contract was insufficient because allegation concerning fair value of property referred to date when action was filed and not to adequacy of consideration at time contract was made. Civ.Code, § 3391, subd. 1.

**2. Appeal and error ⇨907(3)**

On direct appeal on judgment roll alone, it will be presumed in support of judgment that all objections to evidence in support of findings were waived and that facts were treated by all parties as issues properly before the court at the trial.

**3. Appeal and error ⇨171(3)**

Where a matter has been treated as in issue and finding made on that issue, complaint becomes immaterial and judgment based on findings supported by evidence will be upheld even though demurrer to complaint should have been sustained.

**4. Pleading ⇨8(4)**

**Specific performance ⇨114(2)**

In action for specific performance of contract it must be made to appear by affirmative allegations that consideration for contract was adequate and it is insufficient merely to state legal conclusions of such adequacy.

**5. Specific performance ⇨114(2)**

In action for specific performance of contract for sale of realty, specific averment that consideration named in agreement was fair and reasonable value of realty was sufficient "averment of fact" that consideration was full and adequate.

See Words and Phrases, Permanent Edition, for all other definitions of "Averment of Fact".

**6. Specific performance ⇨114(2)**

An allegation that property is reasonably worth a certain sum is an "averment



of fact" within rule requiring affirmative allegation of fact concerning adequacy of consideration in specific performance action.

#### 7. Appeal and error ☞907(3)

Where trial court made findings for plaintiffs in specific performance action, on issue of adequacy of consideration, reviewing court on appeal on judgment roll alone would presume that such issue was properly before trial court and that findings were supported by evidence introduced without objection either to admissibility or to fact that issues were properly before court.

#### 8. Specific performance ☞97(1)

Where vendor in answer in action for specific performance of land contract admitted that if purchasers made unconditional offer to perform their obligations, accompanied by demand for compliance by vendor of his covenant to execute deed, the offer and demand would have been refused, any technical defects in matter of tender were unimportant and did not constitute defense to the action. Civ.Code, § 1440.

#### 9. Specific performance ☞28(2)

A contract under which vendor agreed to sell premises to purchasers, to put them in possession, and to convey to them on or before certain date in consideration of purchaser's agreement to pay vendor certain sum and to assume an encumbrance payable monthly, was not so indefinite as to authorize denial to purchasers of specific performance of the contract.

#### 10. Specific performance ☞28(2)

Only when land contract is incomplete, uncertain or indefinite in its material terms will it not be specifically enforced in equity because of indefiniteness.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by John G. Boro and another against John J. Ruzich for specific performance of contract to sell house and lot to the plaintiff, wherein defendant filed cross-complaint. From an adverse judgment the defendant appeals.

Affirmed.

Howard E. Miller, of San Pedro, for appellant.

J. F. Harvey, of San Pedro, for respondents.

#### WHITE, Justice.

By their amended complaint filed herein plaintiffs allege that on or about June 15, 1941, defendant promised and agreed to sell to and put plaintiffs in possession of a certain house and lot located in the city of Los Angeles, and to execute a deed thereto on or before June 18, 1941. That in consideration of and as a part of said agreement plaintiffs promised to pay to defendant as the purchase price of said property the sum of \$500 payable on or before June 15, 1944, without interest, and that plaintiffs agreed to accept the hereinbefore mentioned conveyance subject to an encumbrance upon said property in the sum of \$4,900 payable by said defendant at the rate of \$50 per month; that plaintiffs promised and agreed to pay said encumbrance in the manner and form therein provided. It is then alleged that pursuant to said agreement plaintiffs entered into possession of said property on or about the 18th day of June, 1941, and ever since have been and at the time of the commencement of this action were in possession thereof. It was further averred in the complaint that relying upon said agreement and while in possession thereunder plaintiffs installed upon said property certain furniture and furnishings and improved the house with a roof, garden equipment and other improvements, including work and labor, all of which it is alleged enhanced the value of the property. Plaintiffs in their complaint further allege that at the time of making the above mentioned agreement defendant had paid approximately \$500 on account of the purchase of the property and "that the consideration named in said agreement is the fair and reasonable value of said property, and is the exact amount of defendant Ruzich's interest therein; that said agreement was and is in all respects just, fair and reasonable to said defendant, and no advantage was taken of said defendant." The complaint then sets forth that defendant is indebted to plaintiffs in the sum of \$168; that on or about November 5, 1941, plaintiffs as part of the purchase price, offered to cancel said indebtedness of \$168 and thereupon demanded from defendant a deed, which demand was refused. That thereafter defendant served upon plaintiffs a notice to vacate and deliver up said real property on or before December 31, 1941. Finally

plaintiffs allege that prior to the filing of this action they had been, and at the time of such filing were, "still ready, willing and able to cancel said indebtedness and to pay defendant Ruzich \$332 the balance due to said defendant, immediately or upon whatever terms the court may deem just, and to perform all terms as are equitable." The prayer is for judgment that defendant be ordered to execute to plaintiffs a conveyance of said property or in other words that the aforesaid agreement made by plaintiffs and defendant be specifically performed.

By his answer defendant denied making or executing the agreement set forth in plaintiffs' complaint and by way of a further and separate defense alleged that plaintiffs were placed in possession of a part of said premises as tenants at will of defendant; that said tenancy has been terminated and that plaintiffs' possession thereof was without right and against the will of defendant. By his third defense, defendant, after denying the allegations contained in plaintiffs' complaint, admitted that he was indebted to plaintiffs in the sum of \$168 but denied that plaintiffs offered to cancel said indebtedness and while denying that plaintiffs demanded a deed, admitted that if such demand had been made the same would have been refused. Defendant further admitted that he served a notice to vacate upon plaintiffs and that on or about November 25, 1941, he offered to pay to plaintiffs the sum of \$168 owed them but that they refused such offer.

Defendant also filed a cross-complaint in ejectment, alleging that plaintiffs were in possession of the premises in question as tenants at will under and by virtue of a verbal lease entered into on or about June 18, 1941; that said lease was terminated as of December 31, 1941, by and through a written notice served upon plaintiffs November 13, 1941, but that plaintiffs refused to surrender possession of said premises. By such cross-complaint defendant sought the recovery of \$10 per day during the continuance of the alleged unlawful detention of the premises by plaintiffs. Plaintiffs' answer to said cross-complaint denied generally the allegations thereof.

The cause was tried before the court sitting without a jury, following which the trial court found that on or about May 15, 1941, the parties hereto entered into certain negotiations in the course of which defend-

ant offered to rent to plaintiffs the property in question at a monthly rental of \$60 but that said offer was refused; that on the 15th day of June, 1941, the parties did enter into the agreement set forth in plaintiffs' complaint in the manner and upon the terms as alleged in said complaint. The court further found that pursuant to their agreement plaintiffs did pay five monthly installments of \$50 each on the encumbrance upon the property, the last of which payments was made on November 1, 1941, but that on or about November 15, 1941, defendant notified the bank to whom such payments were to be made that he would personally pay all future installments on said encumbrance and directed the bank not to accept future payments from plaintiffs. With reference to the fairness and adequacy of the consideration the court found that "at the time of said agreement the fair and reasonable value of said property was the sum of \$5,000; that the consideration named in said agreement is fair, full and adequate, and said agreement was and is in all respects just, fair and reasonable to said defendant and no advantage was taken of said defendant". By its judgment the court directed that upon cancellation of the obligation for \$168 owing from defendant to plaintiffs and upon the payment by plaintiffs to defendant of the sum of \$332 and the assumption by plaintiffs of the balance due on the encumbrance of \$4,900 upon which plaintiffs had paid the sum of \$250 leaving a balance of \$4,650, that the defendant specifically perform his agreement with plaintiffs by executing and delivering to them a good and sufficient deed of quit claim to the property in question. From such judgment defendant prosecutes this appeal.

[1-3] As a first ground of appeal it is contended by appellant that the complaint fails to state a cause of action for specific performance of the contract in question. In support of this argument it is urged that the allegation as to the fair and reasonable value of the property refers to the date when the action was filed and not to the adequacy of the consideration at the time the contract was made. Subdivision 1, Section 3391, Civil Code; *O'Connell v. Lampe*, 206 Cal. 282, 274 P. 336; *Morrill v. Everson*, 77 Cal. 114, 19 P. 190; *Windsor v. Miner*, 124 Cal. 492, 57 P. 386; *Haddock v. Knapp*, 171 Cal. 59, 151 P. 1140. With this claim of appellant we can not agree because the court specifically found that "at

the time of said agreement the fair and reasonable value of the property was the sum of \$5,000; that the consideration named in said agreement is fair, full and adequate". This appeal comes before us on the judgment roll. It is the rule in this state that upon a direct appeal from the judgment on the judgment roll alone it will be presumed in support of the judgment that all the objections to the evidence in support of the findings were waived (*Crowther v. Metalite Mfg. Co.*, 133 Cal.App. 452, 455, 24 P.2d 551), and that the facts were treated by all the parties as issues properly before the court at the trial. If the entire record were before this court a different situation might be presented. *Peck v. Noe*, 154 Cal. 351, 354, 97 P. 865; *McDougald v. Hulet*, 132 Cal. 154, 163, 64 P. 278; *Krasky v. Wollpert*, 134 Cal. 338, 343, 66 P. 309; *Beardsley v. Clem*, 137 Cal. 328, 332, 70 P. 175; *Illinois T. & S. Bank v. Pacific Railway Co.*, 115 Cal. 285, 47 P. 60; *Sukeforth v. Lord*, 87 Cal. 399, 25 P. 497; *Moore v. Campbell*, 72 Cal. 251, 13 P. 689; *Horton v. Dominguez*, 68 Cal. 642, 10 P. 186. The rule is thus stated by our supreme court in *Poledori v. Newman*, 116 Cal. 375, 48 P. 325, 326: "If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings". Where a matter has been treated as in issue at the trial, and a finding made upon that issue, the complaint then becomes immaterial and a judgment based upon findings supported by the evidence will be upheld even though a demurrer to the complaint should have been sustained. *Baker v. Miller*, 190 Cal. 263, 267, 268, 212 P. 11.

By its findings herein the court determined that respondents agreed to pay appellant \$500 for real property of a reasonable value of \$5,000 subject to an encumbrance of \$4,900, or in other words, appellant was to receive \$500 for an equity of \$100. We perceive nothing unfair or unjust in this finding.

[4-7] What we have just said applies with equal force to appellant's claim that the complaint fails to set forth sufficient

facts in support of respondent's allegation therein as to the adequacy of consideration. A long line of cases supports the rule that in a case to compel the specific performance of a contract it must be made to appear by affirmative allegations that the consideration was full and adequate. To merely state the legal conclusion of such adequacy is not enough. *Morrill v. Everson*, 77 Cal. 114, 116, 19 P. 190; *Prince v. Lamb*, 128 Cal. 120, 129, 60 P. 689; *White v. Sage*, 149 Cal. 613, 87 P. 193. Facts which support the conclusion must be pleaded. Such facts are sufficiently alleged in the amended complaint before us in which there is a specific averment that "the consideration named in said agreement is the fair and reasonable value of said property". To allege that property is reasonably worth a certain sum is an averment of a fact. *Walter G. Reese Co. v. House*, 162 Cal. 740, 745, 124 P. 442. While we are impressed that respondents have fully complied with their obligation to show by averment of appropriate facts that the consideration for the contract sought to be specifically enforced is adequate, we are confronted with the further fact, heretofore noted, that this appeal is presented on the judgment roll alone. As pointed out, the court made full and complete findings in favor of respondents on the issue of adequacy of consideration and found that the agreement "was and is in all respects just, fair and reasonable to said defendant and no advantage was taken of said defendant". Therefore, on this appeal, taken upon the judgment roll alone, we must presume that such issues were properly before the court at the trial and that such findings were supported by evidence introduced at the trial without objection upon the part of appellant either to the admissibility of the evidence or to the fact that such issues were properly before the trial court.

[8] Appellant's contention that there is no allegation or finding of an unconditional offer on the part of respondents to perform their obligations under the contract, is answered by the admission made by appellant in his answer that if such offer had been made, accompanied by a demand for compliance by him of his covenant under the contract to execute a deed, such offer and demand would have been refused by him. Therefore, technical defects in the matter of tender become unimportant. Sec. 1440, Civil Code; *Ehrhart v. Mahony*, 43 Cal. App. 448, 451, 184 P. 1010.



[9, 10] Appellant's final contention that the contract is uncertain, is without merit. We are unable to see anything uncertain in relation to this contract. By its terms appellant agreed to sell the premises to respondents, to put them in possession thereof, and to convey the same to them by deed on or before June 18, 1941, in consideration of an agreement by respondents to pay appellant the sum of \$500 on or before June 15, 1944, and to assume an encumbrance of \$4,900, payable at the rate of \$50 per month. It is only when a contract is incomplete, uncertain or indefinite in its material terms that it will not be specifically enforced in equity. *Janssen v. Davis*, 219 Cal. 783, 787, 29 P.2d 196. No such defects appear in the contract with which we are here concerned.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



58 Cal.App.2d 541

**RUZICH v. BORO et al.**  
**No. 13950.**

District Court of Appeal, Second District,  
Division 1, California.  
May 7, 1943.

**1. Trial**  $\Rightarrow$  397(1)

Where question of title and right to possession of land was squarely involved in unlawful detainer action, trial court could not limit the scope of the inquiry nor refuse to find on questions clearly in dispute.

**2. Appeal and error**  $\Rightarrow$  907(3)

On appeal on judgment roll alone, the reviewing court was required to presume that findings in unlawful detainer action that title and right to possession were legally in the defendants were supported by competent evidence, received without objection, and that issues on which such findings were predicated were properly before trial court.

Action by John J. Ruzich against John G. Boro and another for unlawful detainer. The case was consolidated for trial with an action brought by John G. Boro and another against John J. Ruzich for specific performance of a land contract. From an adverse judgment plaintiff appeals.

Affirmed.

Howard E. Miller, of San Pedro, for appellant.

J. F. Harvey, of San Pedro, for respondents.

**WHITE, Justice.**

This appeal was taken upon the judgment roll alone and is from a judgment in favor of defendants and against plaintiff in an unlawful detainer action. The findings disclose that this case was consolidated for trial with an action brought by defendants herein against plaintiff wherein it was sought to compel specific performance of an agreement between the plaintiff and defendants herein under the terms of which the former agreed to sell to the latter the real property here in question. The findings further establish the fact that at the trial of the instant action it was stipulated that the decision herein should be rendered upon the same testimony adduced in the action for specific performance. By its findings in the case now under review the court determined that plaintiff herein did orally agree to sell the premises in question to the defendants; that the relation of landlord and tenant did not at any time exist between them, and that defendants were in possession of the premises by reason of the hereinbefore mentioned agreement to sell and which agreement was, in the consolidated action, ordered specifically enforced.

We have this day filed an opinion in the companion case above referred to, *Boro v. Ruzich*, 137 P.2d 51, wherein we affirmed the judgment of the trial court in that action decreeing specific performance of the contract of sale, and to which case reference is made for a statement of the facts involved in this litigation.

[1, 2] The question of title and right to possession was squarely involved in the case at bar. The parties made these issues by their pleadings and the court could not limit the scope of the inquiry nor refuse to find on questions so clearly in dispute. From what we have said in case No. 13949, *supra*, this day decided, we must presume

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

on this appeal, taken on the judgment roll alone, that the findings herein that both title and right to possession were legally in defendants were supported by competent evidence, received without objection upon the part of plaintiff, and that the issues upon which such findings were predicated were properly before the court at the trial.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



58 Cal.App.2d 509

**SIEBEL v. SHAPIRO et al.**

Civ. 12325.

District Court of Appeal, First District,  
Division 1, California.

May 5, 1943.

Hearing Denied July 1, 1943.

#### 1. Automobiles ⇨243(12)

In action against owner of used car lot for injuries to prospective customer when struck on lot by automobile set in motion by another prospective customer, evidence that defendant had forbidden salesmen to allow customers to start any automobile unless salesmen were present, and that no automobile was to be driven on the lot, was properly excluded as not binding on plaintiff in the absence of notice thereof.

#### 2. Witnesses ⇨379(2)

In action against owner of used car lot and his salesman for injuries to prospective customer struck by automobile on lot started by another prospective customer, evidence that defendant salesman had admitted giving other prospective customer permission to try the automobile was admissible against salesman as impeaching testimony.

#### 3. Trial ⇨48

Evidence admissible for a specified purpose may be received though inadmissible for some other purpose.

#### 4. Evidence ⇨118

Declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of

deliberate design, though not precisely concurrent in point of time, are regarded as "contemporaneous" and admissible as "res gestae".

See Words and Phrases, Permanent Edition, for all other definitions of "Contemporaneous" and "Res Gestæ".

#### 5. Evidence ⇨118

Where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative the probability of fabrication, the declaration is admissible as "res gestae".

#### 6. Evidence ⇨118

To render statements admissible as "res gestae" there must be some occurrence startling enough to produce nervous excitement and render the statements spontaneous and unreflecting, the statements must have been made before there was time to contrive and misrepresent and they must relate to the circumstance of the occurrence preceding them.

#### 7. Evidence ⇨123(10, 11)

In action against owner of used car lot and his salesman to recover for injuries to prospective customer struck by automobile on lot started by another prospective customer, admitting as "res gestae" evidence that five minutes after the accident other prospective customer stated that salesman permitted him to start automobile and that salesman admitted giving such permission was not an abuse of discretion.

#### 8. Appeal and error ⇨987(4)

The duty of the reviewing court is to consider only the legal sufficiency of the evidence to sustain the judgment.

#### 9. Appeal and error ⇨1050(1)

In action to recover for injuries to prospective customer struck by automobile on lot started by another prospective customer who stepped on starter while automobile was in gear believing it was in neutral, refusal to permit mechanic to testify that it was usual to have some free play in shifting lever on the type of automobile in question was not prejudicial where other witnesses testified there was nothing wrong with shifting lever.

#### 10. Appeal and error ⇨1056(1)

In action to recover for injuries sustained in accident, where written notes made by police officer shortly after acci-

dent were read to jury, refusal to admit notes in evidence was not error.

**11. Automobiles** ⚡245(2, 26, 50)

In action against owner of used car lot for injuries sustained by prospective customer struck by automobile which had been started by another prospective customer, whether owner exercised ordinary care in operation of lot and whether other prospective customer had permission to start automobile, and whether failure to exercise ordinary care proximately caused the injuries, were jury questions.

**12. Appeal and error** ⚡882(3)

Where action against owner of used car lot for injuries to prospective customer struck by automobile on lot was based and trial conducted on theory of negligent operation of lot, question whether statute making owner of automobile liable for injuries was applicable to injuries occurring on private property was immaterial. Vehicle Code, § 402, St.1937, p. 2353.

**13. Appeal and error** ⚡1064(1)

In action against owner of used car lot for injuries to prospective customer struck by automobile started by another prospective customer, instructions relative to necessity of a finding of permission to start automobile in order to make owner liable were not prejudicial to defendant owner.

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Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Christian Siebel against Ed Shapiro, doing business as Ed's Motor Vehicle Exchange, and Clifford Lewis, to recover for injuries received by plaintiff, a prospective purchaser on defendant's used car lot when struck by an automobile set in motion by another prospective purchaser. From a judgment for plaintiff, defendants appeal.

Affirmed.

John J. Taheny and Alfred M. Miller, all of San Francisco, for appellants.

Shirley, Robb & Saroyan, of San Francisco, for respondents.

WARD, Justice.

This is an appeal by defendants, the owner of a used car sales lot and his employee, from a judgment in the sum of

\$6,500 for injuries received on the premises by plaintiff, a prospective purchaser.

The sales lot is located on the southeast corner of Eddy Street and Van Ness Avenue in San Francisco. It slopes from north to south and from west to east, the slope on the east end of the lot being rather steep from north to south. On the day of the accident plaintiff and his son, who were shopping for a used car, entered the sales lot of appellant Shapiro with the intention of looking over the cars there on display. All available space was occupied by sixty-five or seventy cars and there were a number of people on the lot, including several salesmen, mechanics and a used car appraiser and buyer of Shapiro. The plaintiff, accompanied by his son, decided to start their inspection at the back (east) part of the lot. They entered the premises from the Van Ness Avenue side, walked across the lot and to the northeast corner thereof. They then walked south, down a row of cars along the east side of the lot. At the southeast corner of the lot is a tool shed, and directly to the north three or four feet, parked parallel thereto and facing the west was a Dodge truck. They walked around the rear of the truck, then to the west along the side of the car and between the truck and the tool shed. Just as plaintiff was passing the left front wheel of the truck another car crashed down the incline into its right front wheel. The collision pushed the front of the truck south several feet, and plaintiff was knocked to the ground and his right leg crushed by the left front wheel.

The cause of the collision is given as follows: Another prospective purchaser, a man sixty-eight years of age, had asked appellant Lewis, employee of Shapiro, whether there were any 1937 Chevrolet coupes on the lot. Lewis, busy with a customer, indicated one, and there is evidence that he told the man, Gjamara, to go over and try it; that he would be with him in a minute. Lewis admitted to a police officer that in substance he had given such a direction, but that he had no idea Gjamara "was going to drive the car." The Chevrolet was parked on the east side of the lot, on the grade, facing south and headed downhill toward the right side of the truck. It had been so parked by appellant Lewis a short time before. The emergency or parking brake had not been set, nor had the wheels of the car been blocked notwithstanding its position. The car had also



been left in second gear, the keys in the ignition switch as was the custom at the lot. Gjamara testified that, after looking the car over he got in, felt the gear shift, found it to be loose and assumed it to be in neutral. He did not touch the emergency or parking brake, but assumed it was set. He turned on the ignition and stepped on the starter. Immediately the car leaped forward, ran down the grade and crashed into the truck. Gjamara, partially deaf, and unable to speak the English language very well, testified that the only car he had ever operated was a 1926 Chevrolet which he purchased in 1930 and drove until 1939.

On the trial of the action, three special questions were submitted to the jury at the request of defendants. They were as follows: "1. Did Peter Gjamara have the express or implied permission of Ed Shapiro to drive the Chevrolet at the time of the accident? 2. Did defendant Ed Shapiro fail to exercise ordinary care in the operation of his used car lot at the time and place in question? 3. If your answer to question No. 2 is 'Yes'—did such failure to exercise ordinary care proximately cause Christian Siebel's injuries?" Each question was answered in the affirmative.

The opening brief of appellants states: "The defendant Shapiro appeals on the following grounds: 1. That the trial court erred in excluding evidence that he had forbidden his salesmen to allow any prospective purchaser to start up by himself or drive any automobile on the sales lot. 2. That the trial court erred in admitting against him over his objections hearsay testimony as to statements of the defendant Lewis made after the accident. 3. That the court erred in the admission and exclusion of other evidence. 4. That the evidence is insufficient as a matter of law to establish that he directly or indirectly gave Gjamara permission to start or operate the automobile. 5. That the evidence is insufficient as a matter of law to establish that Shapiro was negligent. 6. That the evidence shows as a matter of law that the sole proximate cause of the accident was negligence of Gjamara. 7. That the evidence is insufficient as a matter of law to establish that he or Lewis knew or should have known that defendant Gjamara was incompetent. 8. That the trial court erred in the giving and refusing of instructions. 9. That section 402 of the Vehicle Code, St.1937, p. 2353, which makes an owner li-

able for the negligence of one driving with his permission, does not apply to private property. The defendant Lewis appeals on the last six of these grounds and also on the ground that since he was merely a salesman, and is not shown to have any control over the used car lot, he is not liable by reason of the manner of its operation."

In discussing the above, further subdivisions of error are presented, and in addition it is claimed that motions for nonsuit and a directed verdict should have been granted. The latter contention may be disposed of in considering the main points.

[1] The offers to prove that Shapiro had forbidden salesmen to allow a customer to start the motor in any car on display unless they (the salesmen) were nearby, and that under no circumstances was a car to be driven on the lot, were properly excluded. Plaintiff was a business invitee, and, in the absence of some communication or notice that the proprietor was not responsible for the negligence of his employees or of another invitee, the proprietor owed him a duty of notice, and he had the right to assume that he would not be exposed to the danger of personal injury. It seems reasonable to conclude that plaintiff, upon being given permission by an employee to "try" a car, had the right to assume that the employer had authorized the employee to extend such invitation, and the restriction which the proprietor claimed to have placed upon his employees would not be binding upon plaintiff in the absence of notice thereof. Assuming that the offered evidence was admissible, no prejudicial error occurred by its exclusion since defendant Lewis testified "we allow no one to drive a car on this lot except an employee."

[2,3] Certain testimony of police officers (who arrived at the scene approximately five minutes after the accident), was introduced in evidence to the effect that Gjamara told them Lewis had given him permission to "try" the car; and that Lewis admitted doing so, but claimed he did not think Gjamara would attempt to "drive" it. Lewis denied making both statements. The evidence may be considered as impeaching testimony and therefore admissible against Lewis. With certain exceptions which need not be enumerated here, the general rule is that if evidence is admissible for a specified purpose it may be received though inadmissible for some

other purpose. *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 117 P.2d 841; *Inyo Chemical Co. v. City of Los Angeles*, 5 Cal.2d 525, 55 P.2d 850; *Emery v. Pacific T. & T. Co.*, 43 Cal.App.2d 402, 110 P.2d 1079.

[4-8] Independent of the foregoing, we find recent decisions disapproving the long established rule that only statements made during, and spontaneously caused by the event, are admissible as *res gestae*. *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 P. 56; *Williams v. Southern Pacific Company*, 133 Cal. 550, 65 P. 1100. In *Showalter v. Western Pacific R. Co.*, 16 Cal.2d 460, 465, 467, 468, 469, 106 P.2d 895, 898, it was held "that declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible. \* \* \* in our opinion the rule to be followed is that where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication, said declaration is admissible. \* \* \* The basis for this circumstantial probability of trustworthiness is 'that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief'. To render them admissible it is required (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i. e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. *Wigmore on Ev.* 2d Ed., sec. 1750. The practice in this state heretofore has been to allow the trial court no discretion in determining the admissibility of alleged *res gestae* statements; however, under the view taken herein there is necessarily some element of discretion in the trial court." We are not in a position to say that the trial court abused its discretion. In view of the relaxed rule, and under all the facts of the case, the interval between the event and the statements does not seem to be unreasonable. The duty of the reviewing

court is to consider only the legal sufficiency of the evidence to sustain the judgment. *Medico-Dental, etc., Co. v. Horton & Converse*, 21 Cal.2d 411, 132 P.2d 457.

[9] The claim is made that the court refused to permit a mechanic to testify that it was usual to have some free "play" in the shifting lever of the type and model of the automobile in question. Assuming the competency of the witness, no prejudice resulted in the ruling as other witnesses testified there was nothing wrong with the shifting lever.

[10] On the examination of a police officer, it was contended by appellants that certain written notes made by him should be received in evidence. The notes in question were read to the jury.

[11] The contentions that Shapiro exercised ordinary care in the operation of his used car lot; that Gjamara did not have permission to start the automobile, and that the failure to exercise ordinary care proximately caused the injuries to respondent (*Fennessey v. Pacific Gas & Electric Co.*, 20 Cal.2d 141, 124 P.2d 51) are definitely answered in the "special questions" propounded to the jury. In view of the evidence heretofore related, as a matter of law we are unable to hold to the contrary.

[12] Appellants refer to the inapplicability of Vehicle Code § 402. Respondent does not claim that the verdict is based upon the owners' responsibility as set forth in that section. He stands solely upon the "negligent operation of the lot" theory. That the trial was conducted upon the latter theory appears from the transcript read as a whole. Appellants state in their opening brief that "Section 402 is not applicable to injuries occurring on private property." It does not seem necessary to discuss this matter further.

[13] Finally, appellants attack certain instructions given or refused. The first claimed error is in the following given instruction: "From the fact that defendant Ed Shapiro owned the Chevrolet automobile at the time of this accident, which fact this defendant admits, the law allows you to draw the inference that the driver, Peter Gjamara was using that automobile with permission of the defendant Ed Shapiro at the time of the accident." The particular instruction could have been amplified to the effect that any such inference might be rebutted by contrary evidence. In other in-

structions the jury was fully instructed on the necessity of finding permission. They were instructed in substance that if Lewis had no authority from Shapiro to permit Gjamara to drive the automobile that Shapiro was not liable; that if Gjamara operated the car without proper permission Shapiro could not be held liable. In the light of the additional instructions, and the failure to request amplification of the particular instruction, it does not appear that appellants were harmed.

Appellants in their opening brief also claim error in the refusal to give an instruction relative to the mechanical condition of the car. At the time of oral argument appellants fairly and frankly admitted that after due consideration the point was without merit.

The further subdivisions of error above referred to relate to questions already considered.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.



58 Cal.App.2d 566

**FRACE v. LONG BEACH CITY HIGH SCHOOL DIST. et al.**  
Civ. 13800.

District Court of Appeal, Second District,  
Division 3, California.

May 12, 1943.

Hearing Denied July 8, 1943.

**1. Appeal and error ☞917(1)**

Where plaintiff declined to amend complaint after demurrer was sustained, District Court of Appeal would not consider possibility that any defect could be cured by amendment and would presume that plaintiff had stated case as strongly as possible.

**2. Pleading ☞34(1)**

Rule that complaint should be liberally construed with view to substantial justice between parties does not permit insertion by construction of averments which are not directly made or within fair import of those which are set forth. Code Civ. Proc. § 452.

**3. Pleading ☞37**

Facts necessary to a cause of action but not alleged must be taken as having no existence.

**4. Schools and school districts ☞120**

Allegation that 17 year old plaintiff was injured in explosion resulting from his mishandling of chemicals which had been taken from high school storeroom by students did not state cause of action against school.

**5. Negligence ☞62(3)**

Where defendant's original negligence is followed by independent act of third person resulting in direct injury to plaintiff, defendant's negligence may constitute "proximate cause" of injury if defendant should have known intervening act was likely to happen, otherwise chain of causation is broken by intervening act.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

**6. Pleading ☞8(3), 34(5)**

The phrase "in that" as used in allegation stating facts relied on to constitute negligence means "because" or "for the reason that" and reduces allegation preceding it to a "conclusion" and limits scope thereof to that of allegation which follows.

See Words and Phrases, Permanent Edition, for all other definitions of "Because", "Conclusion", "For the Reason That" and "In That".

**7. Schools and school districts ☞120**

Allegation that school authorities allowed two students in storeroom without supervision, knowing storeroom was an attraction and that if given opportunity some students would steal chemicals therefrom, was insufficient to charge authorities with liability for injuries sustained in explosion of stolen chemicals by 17 year old boy to whom chemicals were given by students.

**8. Schools and school districts ☞89**

Act of high school students in stealing chemicals from storeroom and giving them to 17 year old plaintiff who was injured in explosion of chemicals broke chain of causation between injury and any negligence of school in supervision of storeroom. Pen.Code, § 26.

**9. Schools and school districts ☞89**

High school authorities were not bound to anticipate that particular students would



steal chemicals from storeroom so as to charge authorities with negligence in admitting such students to storeroom or with liability for injuries sustained by another boy in explosion of stolen chemicals.

#### 10. Schools and school districts — 120

Complaint against high school for injuries sustained by 17 year old boy in explosion of chemicals stolen from storeroom by students which failed to show either that school authorities were negligent in admitting students to storeroom or that they should have anticipated that such an accident might result was insufficient.

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Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Charles Frace against Long Beach City High School District and others to recover for injuries sustained in an explosion of chemicals. From a judgment for defendants after plaintiff had failed to amend following the sustaining of a demurrer to his complaint, plaintiff appeals.

Affirmed.

Merrill Brown, of Los Angeles, for appellant.

Joseph A. Hall, of Long Beach, J. H. O'Connor, Co. Counsel, of Los Angeles, and Kenneth Sperry, of Long Beach, for respondents.

SHAW, Justice pro tem.

Plaintiff was injured by the explosion of chemicals with which he was attempting to perform an experiment, and in this action seeks to recover damages for the injuries so received. A demurrer to his amended complaint was sustained with leave to amend, he did not amend, and he appeals from the ensuing judgment.

[1-3] Since plaintiff declined to amend his complaint, we do not consider the possibility that any defects in it could be cured by amendment, but presume that the pleader has stated his case as strongly as it can be stated in his favor. *Royal Ins. Co. v. Mazzei*, 1942, 50 Cal.App.2d 549, 555, 123 P.2d 586. While the complaint should be liberally construed, with a view to substantial justice between the parties, *Code Civ. Proc.* § 452, that rule "does not, however, permit the insertion, by construction, of averments which are neither directly made nor within the fair import of those which

are set forth. On the contrary, facts necessary to a cause of action but not alleged must be taken as having no existence." 21 Cal.Jur. 54; *Feldesman v. McGovern*, 1941, 44 Cal.App.2d 566, 571, 112 P.2d 645; *Estrin v. Superior Court*, 1939, 14 Cal.2d 670, 677, 96 P.2d 340.

From the amended complaint the following facts appear. The defendant district conducted a high school, consisting of several buildings, in one of which there was a small chemical supply room. In this room chemicals, some of which would, upon admixture, burn and explode, were stored for the use of chemistry students in performing laboratory tests and experiments. The defendant Lewarton was employed by defendant district as janitor and custodian and as such had the care and custody of this supply room and the keys thereto. On several occasions, shortly before plaintiff was injured, Lewarton unlocked this supply room and permitted two high school students, named Murphy and McNanamy, to enter this room, and to remain there and leave without their being under observation, all of which was contrary to the rules of the school. These two students, although not authorized so to do, took from the storeroom potassium chlorate and phosphorus and kept these chemicals in the garage at the home of McNanamy, where plaintiff watched the other two boys experiment with them without injury. Plaintiff thereupon asked McNanamy if he could use the chemicals for an experiment, McNanamy gave plaintiff small quantities of them, plaintiff mixed them in a container and shook them, and from the resulting explosion received the injuries for which he sues. Plaintiff was, at the time, a boy of seventeen, and it is alleged that "by reason of their immature age, inexperience and lack of knowledge of chemicals neither the said McNanamy nor the plaintiff knew that use of said chemicals by them was dangerous and hazardous or would cause an explosion or that the use of said chemicals by plaintiff was likely to injure person or property."

[4] It is obvious that the facts thus far set forth are not sufficient to impose any liability on the defendants. They show merely that unauthorized persons took, in legal effect stole, some chemicals from defendant's storeroom, and that plaintiff, obtaining possession of some of these chemicals, was injured by reason of his unwitting mishandling of them. Responsi-

bility for such results does not attach to the owner whose property is wrongfully taken. Indeed, we do not understand plaintiff to contend otherwise. He points to certain additional allegations and contends that they avoid the conclusion just stated, and that defendants may be held here by the joint operation of the rule fastening liability in certain cases upon one who permits children to play with an attractive but dangerous device (the rule of the "turntable cases") and the other rule holding a negligent actor liable for the results of his negligence even though the independent act of another intervenes between his negligence and the results, where that intervening act is one which he ought, in reason, to have anticipated. The allegations thus pointed out are these: "That at all times herein mentioned the defendants and each of them knew: that the use of said chemicals by students, except under the personal supervision and direction of one skilled in the science of chemistry, was apt to cause injury to person and property; that said supply room and the chemicals therein was an attraction and allurement to the students of the high school; and that if given an opportunity some of said students would steal chemicals therefrom for the performance of their own and unsupervised tests and experiments thereby exposing themselves and others to serious personal injury."

[5] The rule regarding an independent intervening cause on which plaintiff relies is thus stated in *Hale v. Pacific Tel. & Tel. Co.*, 1919, 42 Cal.App. 55, 58, 183 P. 280, 281, one of the cases cited by him: "\* \* \* where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury."

[6] The negligence of which defendants were guilty, according to plaintiff's argu-

ment, is that with the knowledge depicted in the allegation last quoted, they permitted Murphy (whom we so name in spite of the curtailment of his surname in the allegation next to be quoted) and McNamamy to take the chemicals from the storeroom, or at least made it possible for them to do so. To appraise this argument we must examine more closely the allegations regarding the taking. They are that Lewarton "negligently and in violation of his duties as such custodian, permitted two students of said high school, to wit, Robert Murph and Ralph McNamamy to take certain chemicals from said supply room, in that with knowledge that said students were not authorized by any teacher or other agent or employee of his codefendants, to enter said chemical supply room or to take chemicals therefrom; he unlocked said supply room for said students and permitted them to remain therein and leave therefrom unobserved by himself or any other agent or employee of his codefendants; all of which was in violation of the rules and regulations of said high school and of his duties as such custodian." It is to be noted here that the allegation that Lewarton permitted the students named to take chemicals is followed and qualified by the words "in that." This phrase means "because, for the reason that" (*Webster's New International Dictionary*, 1942 Ed.), and its effect is to reduce the allegation preceding it to a mere conclusion, and limit the scope of that allegation to that of the one which follows. So limited, the language last quoted contains no statement that Lewarton knew the chemicals were being taken, or with such knowledge allowed that to be done, but amounts merely to a statement that he did acts which facilitated, and omitted precautions which would have prevented, such taking, and in so doing violated the rules. If this language were capable of any stronger construction, which we doubt, it would be ambiguous, and against such ambiguity the demurrer which was sustained aimed a specification. Since plaintiff failed to amend in the face of this demurrer, we can give the allegation no stronger construction in favor of plaintiff than that above stated.

[7-10] So construing the complaint we have nothing more than a statement that defendants allowed two certain students to enter and remain in the storeroom without watching them and that they knew the supply room "was an attraction and allure-

ment to the students of the high school; and that if given an opportunity some of said students would steal chemicals therefrom." The negligence, if any, thus charged is not a general failure to watch the chemicals or take precautions against their surreptitious removal. These chemicals were not in the open or exposed to taking by any who were so minded, as were the dynamite caps in *Hale v. Pacific Tel. & Tel. Co.*, supra, 42 Cal.App. 55, 183 P. 280, and in *Lambert v. Western Pac. R. Co.*, 1933, 135 Cal.App. 81, 26 P.2d 824, and the mortar box in *Katz v. Helbing*, 1928, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825, on which plaintiff relies. On the contrary they were in a closed storeroom which, as the complaint shows, was kept locked and access to which was obtained only by inducing defendant Lewarton, who "had the keys thereto," to unlock it. The mere act of unlocking this room and permitting two high school students to enter and remain in it, even though a violation of rules, without more, does not seem to us to be actionable negligence; but if it can be so characterized, it is not the direct cause of plaintiff's injuries. Between those injuries and the acts of defendant intervene the independent acts of Murphy and McNanamy in stealing the chemicals and in giving them to plaintiff, as well as his own act in experimenting with them. We assume that plaintiff's act is removed from consideration by the allegation, above quoted, of his youth and inexperience. But the acts of Murphy and McNanamy break the chain of causation and relieve defendants of responsibility for plaintiff's injuries, assuming they were guilty of some negligence, unless, as stated in *Hale v. Pacific Tel. & Tel. Co.*, supra, defendants should have anticipated those acts "as reasonably likely to happen." There is no basis in the complaint for fastening such anticipation on defendants. Nothing is alleged in the complaint about the age, character or habits of Murphy or McNanamy—nothing to make it appear that defendants should reasonably have anticipated that if left alone in the storeroom they would steal and carry away the chemicals there stored. They were high school students; and while their ages are not stated, such students are usually above the age of fourteen, at which, in the eyes of the law, children become capable of committing crimes.

Pen.Code, § 26. It has been held that one who leaves dynamite caps (which are, of course, a dangerous device) in a place accessible to the public and unguarded is not liable for injury to boys (aged in one case 10, and in the other 11) who steal them, play with them and are injured in resulting explosions, in the absence of allegations that the boys did not know it was wrong to take the caps, the ground of decision being that boys of these ages presumably know the moral character of their acts in taking the caps, and defendants were therefore not bound to anticipate such acts. *Nicolosi v. Clark*, 1915, 169 Cal. 746, 147 P. 971, L.R.A. 1915 F, 638; *Bradley v. Thompson*, 1924, 65 Cal.App. 226, 223 P. 572. But no authority is needed for the proposition that not all high school students are given to misappropriation of property such as that of which these two students were guilty; indeed, plaintiff admits as much by his allegation that "some" students would so act. This allegation would possibly be sufficient to show negligence on defendants' part if the chemicals were so kept that all students could have free access to them; but to serve that purpose where it appears that only a few gained access to them and those few could gain it only by affirmative acts of the defendants, there is needed a further showing that the defendants had some reason to anticipate stealing by those to whom they did allow access to the storeroom. For all that appears in the complaint here, the two students who did have access to the chemicals were up to that time of unimpeached reputation and unblemished character and their misappropriation of the chemicals the first such act in which they had ever engaged. If any different state of facts existed, it should have been alleged; and in the absence of an allegation we must presume its nonexistence, under the rules already stated. The complaint fails to show either that defendants were negligent in admitting the two students to the storeroom or that they should have anticipated that their acts in doing so would or might result in such an accident as that which occurred to plaintiff.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



58 Cal.App.2d 271

**UNEMPLOYMENT RESERVES COMMIS-  
SION v. ST. FRANCIS HOMES  
ASS'N.**

Civ. 12251.

District Court of Appeal, First District,  
Division 1, California.

April 20, 1943.

Hearing Denied June 17, 1943.

**1. Courts** ⇨190(3½)

Under statutes, question of jurisdiction of municipal court could properly be raised for first time on petition for rehearing before Appellate Department of Superior Court. Code Civ.Proc. §§ 89, 396.

**2. Courts** ⇨190(1)

Appellate Department of Superior Court has final jurisdiction on appeal of all cases arising in municipal court. Code Civ.Proc. §§ 65 et seq., 85 et seq.; Const. art. 6, § 5.

**3. Courts** ⇨190(1)

District Court of Appeal may hear and decide matters and proceedings pending in Supreme Court but transferred to District Court of Appeal, but neither appeal nor transfer confers jurisdiction if lacking in first instance. Const. art. 6, § 4b.

**4. Courts** ⇨190(8, 9)

On appeal, jurisdiction of Supreme Court and District Courts of Appeal is confined to an appropriate order of affirmance, modification, or reversal, or for a new trial, or direction that further proceedings be had, subject to taking additional evidence for purpose of making findings contrary to or in addition to those of trial court, but not in sense of a retrial. Code Civ.Proc. §§ 53, 956a; Const. art. 6, § 2.

**5. Courts** ⇨190(8)

**Justices of the peace** ⇨171(1)

A retrial in the Superior Court as such or in a trial department thereof may be had either under section 396 providing for transfer of cases filed in courts not having jurisdiction or upon a trial de novo after appeal under sections 973-982a relating to appeals from Justices' Courts. Code Civ.Proc. §§ 396, 973-982a.

**6. Courts** ⇨190(8)

Appellate Department of Superior Court does not have jurisdiction on such

appeals as require a retrial in Superior Court and may not render same or different order, judgment, or decree of its own, but is confined to an affirmance, modification, or reversal of judgment of trial court. Code Civ.Proc. § 77b.

**7. Courts** ⇨190(8)

Where Superior Court does not conduct a new trial but merely affirms or reverses a judgment, its appellate jurisdiction is similar to that of any appellate court. Code Civ.Proc. § 77b.

**8. Appeal and error** ⇨32

Where municipal court was without jurisdiction to render judgment and Appellate Department of Superior Court merely reversed judgment, Superior Court did not exercise "original jurisdiction" so as to authorize further appeal. Code Civ.Proc. §§ 77b, 89, 396.

See Words and Phrases, Permanent  
Edition, for all other definitions of  
"Original Jurisdiction".

**9. Appeal and error** ⇨32

Where Appellate Department of Superior Court was without jurisdiction to review judgment of municipal court by reason of municipal court's lack of jurisdiction to try case in first instance, failure of parties to object did not clothe Appellate Department with original jurisdiction over subject matter. Code Civ.Proc. §§ 65 et seq., 77b, 85 et seq., 89.

**10. Appeal and error** ⇨32

Appellate jurisdiction of a reviewing court over orders of a Superior Court is limited to matters in which the latter court is clothed with original jurisdiction, and does not extend to actions or proceedings in which Superior Court exercises only the appellate function. Code Civ.Proc. § 963.

**11. Appeal and error** ⇨120(2)

An order of Appellate Department of Superior Court reversing an order or judgment of municipal court, or an order denying a petition to rehear order of reversal, is not an "appealable order". Code Civ.Proc. § 963.

See Words and Phrases, Permanent  
Edition, for all other definitions of  
"Appealable Order".

**12. Appeal and error** ⇨18

Mere fact that reviewing court may have jurisdiction of parties and of cause

of action does not authorize exercise of such jurisdiction in an improper manner.

**13. Appeal and error** ⇨21

Where matter over which Superior Court had original jurisdiction was brought to municipal court and appeal was taken from judgment of municipal court to Appellate Department of Superior Court which was powerless to exercise original jurisdiction of Superior Court, mere fact that parties were anxious to have main question decided by District Court of Appeal did not confer jurisdiction to determine such issue on appeal from Appellate Department of Superior Court, and appeal was dismissed. Code Civ.Proc. § 77b.

**14. Appeal and error** ⇨20

Where inferior court tries a cause within original jurisdiction of Superior Court and thereafter Superior Court exercises true appellate jurisdiction as distinguished from new trial jurisdiction on appeal, there can be no appeal from judgment of Superior Court; but, if Superior Court exercises new trial jurisdiction on appeal and tries case, Appellate Courts will ignore original irregularity and will review judgment of Superior Court. Code Civ.Proc. §§ 77b, 973-982a; Const. art. 6, § 5.

**15. Courts** ⇨486

Whenever it appears that municipal court has no jurisdiction over a case pending therein and properly within jurisdiction of Superior Court, it is mandatory duty of municipal court to transfer case to Superior Court. Code Civ.Proc. §§ 89, 396.

**16. Courts** ⇨188(2)

The "legality of a tax" is involved within meaning of statute depriving municipal court of jurisdiction in a case involving legality of any tax when taxpayer contends that tax is illegally assessed or levied against him. Code Civ.Proc. § 89.

See Words and Phrases, Permanent Edition, for all other definitions of "Legality of any Tax".

**17. Courts** ⇨188(2), 212

Purpose of statute depriving municipal courts of jurisdiction over controversies involving legality of any tax and constitutional provision giving Supreme Court appellate jurisdiction over such controver-

sies was to secure decisions in such controversies which would be binding authority in the state. Code Civ.Proc. § 89; Const. art. 6, § 4.

**18. Constitutional law** ⇨12

**Statutes** ⇨181(2)

The provisions of the Constitution or of a statute should receive a practical rather than a technical construction.

**19. Courts** ⇨188(2)

Where complaint of Unemployment Reserves Commission alleged that defendant was an employer and had not paid tax for which recovery was sought, and answer denied that defendant was an employer within meaning of taxing act, "legality of the tax" was in issue and, under jurisdictional statute, municipal court was without jurisdiction to try the case. Code Civ.Proc. § 89; St.1935, p. 1226, as amended; St. 1937, p. 2057, § 7.

**20. Courts** ⇨190(1), 486

Where case involving legality of tax, exclusive trial jurisdiction of which rested in Superior Court, was erroneously tried in municipal court and judgment of municipal court was reversed by Appellate Department of Superior Court, cause rested in municipal court and was required to be transferred to Superior Court for exercise of Superior Court's original trial jurisdiction and purported trial and purported appeal were void for want of jurisdiction. Code Civ.Proc. § 396.

KNIGHT, J., dissenting in part.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Robert McWilliams, and Thomas M. Foley, Judges.

Action by the Unemployment Reserves Commission against St. Francis Homes Association to recover delinquent taxes. From a judgment of the Appellate Department of the Superior Court of the City and County of San Francisco reversing a judgment of the municipal court of such city and county for defendant, defendant appeals.

Appeal dismissed for want of jurisdiction.

Grover O'Connor, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., John J. Dailey, Deputy Atty. Gen., Forrest M. Hill and Miriam E. Wolff, both of Sacramento, and Paul M. Joseph, of Los Angeles, for respondent.

WARD, Justice.

The appeal herein by defendant is noted as an appeal to the Supreme Court from a "decision, order, judgment and decree" of the Appellate Department of the Superior Court of the City and County of San Francisco which it claims "purported to reverse a purported judgment" of the municipal court in its favor. The notice of appeal also sets forth that defendant appeals from the order made by the three judges "purportedly acting as the Appellate Department of said court \* \* \* denying the petition of said Defendant for a rehearing."

The complaint was filed in the Municipal Court of the City and County of San Francisco to recover sums aggregating \$478.68 as taxes, alleged to be delinquent, and interest at the rate of 12 per cent per annum from the respective delinquent dates. The action was tried on an agreed statement of facts, and judgment was rendered in favor of defendant and against plaintiff in all respects. Plaintiff appealed to the appellate department of the superior court where the matter was again submitted on an agreed statement of facts, and after hearing argument thereon that department reversed the judgment. It did so in the following terms: "Wherefore, it is ordered, adjudged and decreed by the court that the judgment made and entered in the Municipal Court of the City and County of San Francisco, State of California, in the above entitled cause be and the same is hereby reversed. Appellant to recover costs." Subsequently a petition for rehearing was denied.

[1] Plaintiff, respondent herein, states that appellant raised the issue of the jurisdiction of the municipal court for the first time on the petition for rehearing before the appellate department of the superior court. Jurisdiction of a trial court may be raised when "lack of jurisdiction appears." Code Civ.Proc. sec. 396; see, also, sec. 89 of the same code.

The particular question of jurisdiction, and the other points raised on this purported appeal, namely, "Does a case for the collection of a tax involve the legality of

the tax" under a claim of exemption from the particular tax, etc., will hereafter be given attention.

[2, 3] The appellate department of the superior court has final jurisdiction on appeal of all cases arising in the municipal court. (Calif. Const. art. VI, sec. 5; Code Civ.Proc. pt. 1, tit. 1, ch. 5, art. 2; Code Civ.Proc. pt. 1, tit. 1, ch. 4.) Appellant contends that upon the appeal in the present proceeding, the appellate department of the superior court acquired original jurisdiction of the action and that the order made by such appellate court is appealable to the Supreme Court, which in turn by transfer conferred jurisdiction upon the District Court of Appeal. The District Court of Appeal may hear and decide matters and proceedings pending in the Supreme Court but transferred (Const. art. VI, sec. 4b) to the District Court of Appeal, but neither the appeal nor the transfer confers jurisdiction if lacking in the first instance.

[4-7] On appeal, the jurisdiction of the Supreme Court and the District Courts of Appeal is confirmed to an appropriate order of affirmance, modification, reversal, an order for a new trial, or direction that further proceedings be had (Cal. Const. art. VI, sec. 2; Code Civ.Proc. sec. 53) subject, under certain circumstances, to taking additional evidence for the purpose of making findings contrary to or in addition to those of the trial court (Code Civ.Proc. sec. 956a), but not in the sense of a retrial. A retrial in the superior court as such, or in a trial department thereof, may be had under the provisions of sec. 396, Code Civ. Proc., supra, or a trial de novo after appeal under the provisions specifically set forth in Code Civ.Proc. secs. 973-982a. *Redlands, etc., Sch. Dist. v. Superior Court*, 20 Cal.2d 348, 125 P.2d 490. The appellate department of the superior court does not have jurisdiction "on such appeals as require a retrial in the superior court" (Code Civ.Proc. sec. 77b), and hence may not render the same or a different order, judgment or decree of its own, but is confined to an affirmance, modification or reversal of the judgment etc. of the trial (in this case municipal) court. If the superior court does not conduct a new trial, but merely affirms or reverses a judgment its appellate jurisdiction is similar to that of any appellate court. *Portnoy v. Superior Court*, 20 Cal.2d 375, 125 P.2d 487.



[8-11] The order made by the appellate department of the superior court that the judgment "is hereby reversed" is not an appealable order. It is not a judgment in favor of, or against, the respective parties, but simply an order revising a judgment of the municipal court, a matter in which the superior court did not exercise original jurisdiction. There was not only a lack of original jurisdiction in the appellate department of the superior court, but its decision was concededly made without reference to the question of jurisdiction. By failure to object, the parties hereto could not clothe the court with original jurisdiction over the subject matter. The appellate jurisdiction of a reviewing court over the orders of a superior court is limited to matters in which the latter court is clothed with original jurisdiction, and does not extend to actions or proceedings in which it exercises only the appellate function. An order of the appellate department of the superior court reversing an order or judgment of the municipal court, or an order denying a petition to rehear the order of reversal, is not an appealable order. Code Civ.Proc. sec. 963.

It has been urged that the form of the order or judgment of the superior court is immaterial; in other words, that it is the substance and not the form of presentation of a matter to a state reviewing court which controls. So far as we have been able to discover from the cases cited, the appeals from the inferior to the superior court were direct to the superior court as such wherein original or concurrent jurisdiction existed, and not as in this proceeding, an appeal from a judgment rendered on an appeal to the appellate department of the superior court without power to conduct a trial de novo. Code Civ.Proc. sec. 77b, *supra*.

[12, 13] A reviewing court may have jurisdiction of the parties and of the cause of action, but it is essential that it exercise such jurisdiction in the proper manner. *Fortenbury v. Superior Court*, 16 Cal.2d 405, 106 P.2d 411; *Spreckels S. Co. v. Industrial Acc. Comm.*, 186 Cal. 256, 199 P. 8. It is true that often in the interest of expedition of litigation, the form of presentation adopted by a litigant, particularly in the matter of writs, is disregarded. It is also true that in the absence of statutory provision a reviewing court will adopt or establish a method of review in a matter within its jurisdiction,

but this does not mean that a litigant may arbitrarily select the method of presentation. If an order is not appealable, a reviewing court has no jurisdiction to hear the appeal though the same question may be susceptible of determination by the issuance of an appropriate writ. The fact that the respondent herein is anxious to have the main question decided by this court does not confer jurisdiction to determine that issue on this appeal. In the *City of Madera v. Black*, 181 Cal. 306, 184 P. 397, no objection was made to the jurisdiction of the superior court. The case was within its original jurisdiction. The court took jurisdiction and determined the case on its merits. A motion to dismiss in the Supreme Court was denied. In the present case, without original jurisdiction the appellate department assumed appellate jurisdiction. Whatever was said in *Johnston v. Wolf*, 208 Cal. 286, 280 P. 980, the court concluded that original jurisdiction was given to the superior court, and appellate jurisdiction to a higher reviewing court.

[14] The right of appeal, or the availability of an appropriate writ, in matters originally instituted in inferior courts and subsequently appealed or transferred to the superior court, has been definitely determined in this state. In *Redlands, etc., Sch. Dist. v. Superior Court*, *supra*, 20 Cal.2d pages 355, 351, 125 P.2d pages 494, 492, the court said: "The distinction which is made between the exercise of true appellate jurisdiction by the superior court and the exercise of its new trial jurisdiction on appeal (that is, a distinction between appellate jurisdiction in its ordinary sense and derivative jurisdiction) serves to complicate the relationship between the justices' courts and the superior courts in many ways. It is, nevertheless, a distinction which cannot be ignored in view of the many cases which have passed upon the point." "After an appeal to the superior court from a judgment in a justice's court as provided in Code of Civil Procedure, sections 973-982, no further appeal to the higher courts of the state exists in cases such as the present one under our constitutional and statutory provisions. Const. art. VI, §§ 4, 4b, 5; Code Civ.Proc., §§ 973-982; 6 Cal.Jur. 10 Yr.Supp. 699-701. If, therefore, the superior court has exceeded its jurisdiction in this case, the absence of a speedy and adequate remedy by appeal or otherwise entitles petitioners

to a writ of review for the purpose of annulling the action of the superior court." See *Couldthirst v. Southern Pac. R. Co.*, 49 Cal.App. 525, 193 P. 796. In *Raisch v. Sausalito Land, etc., Co.*, 131 Cal. 215, 216, 217, 63 P. 346, the court said: "The appellate jurisdiction of this court over the judgments of the superior court is limited to the cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction." In *City of Santa Barbara v. Eldred*, 95 Cal. 378, 381, 30 P. 562, 563, the court said: "But, entirely disregarding the action of the lower court upon the jurisdictional question, appellant carried the case to the superior court by appeal, upon questions of both law and fact, and proceeded to trial upon the merits. The proper procedure certainly would have been for the superior court to have set aside the judgment and ordered the police court to remand the cause in accordance with section 838, heretofore cited. Under such a course the superior court would have obtained jurisdiction of the cause in the regular and orderly way, and, upon the right to appeal to this court, there could be no question." In *Moye v. National Surety Co.*, 208 Cal. 279, 280 P. 982, on an appeal to the Superior Court of Los Angeles County from a judgment of the municipal court, the Supreme Court considered the contention that the latter court had no jurisdiction on a subsequent appeal under the provisions of sections 4b and 5 of art. VI of the Constitution, as amended in 1928. A motion to dismiss was granted. See *Herbold v. Atchison, etc., Ry. Co.*, 117 Cal.App. 430, 4 P.2d 184.

If the municipal court had jurisdiction herein, then the determination of the appellate department of the superior court is final and the case is not appealable to the Supreme Court. (Calif.Const. art. VI, sec. 5.) If the Superior Court had original jurisdiction it did not exercise it.

Ordinarily it is not the function of a reviewing court to direct the procedure or policy of a litigant. In this case, bearing in mind that appellant has so strenuously and earnestly argued that there should be a determination of the main question involved in this purported appeal, and in view of the fact that respondent sees "no bar to this court's appellate jurisdiction in the form of the Superior Court's judgment"; and in further view of the im-

portance of the question, and with the purpose of expediting the final determination of the litigation without the necessity of the issuance of a writ directed to the municipal court by a court of superior jurisdiction, may we suggest that upon affirmance of the judgment by the appellate department of the superior court, this case is automatically returned to the municipal court. Appellant contends: "As the Municipal Court did not have any jurisdiction over the case, that Court should, when it appeared from the pleadings or on the hearing that the case involves the legality of a tax, have transferred the case to the Superior Court." Respondent urges that the municipal court properly exercised jurisdiction.

[15] The solution of this problem turns upon whether this controversy involves "the legality of any tax, impost, assessment, toll or municipal fine" as those words are used in sec. 89 of the Code of Civil Procedure in denying to municipal courts jurisdiction over such controversies. It is our opinion that if the "legality of any tax" is here involved, the municipal court had no jurisdiction, and that whenever that fact appeared—whether in the pleadings or at the trial—it was the duty of the municipal court to transfer the cause to the Superior Court under the mandatory provisions of sec. 396 of the Code of Civil Procedure.

Prior to 1933 it had been held that where the complaint did not disclose that the legality of a tax was involved, and the answer was unverified or merely denied that the defendant was liable for the amount sued for, no case involving the legality of a tax was involved. *De Long v. Haines*, 1 Cal.Unrep. 120; *Williams v. Mecartney*, 69 Cal. 556, 11 P. 186. The rule of those cases was specifically changed when sec. 396 of the Code of Civil Procedure was amended in 1933. That section now provides that if an action is properly commenced in the municipal court so far as the pleadings are concerned, but it thereafter appears "at the trial, or hearing, that the determination of the action or proceeding \* \* \* will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings" and transfer the action to the superior court.

The complaint in this case, filed in the municipal court, merely alleged that the defendant is an "employer" as such term is used in the taxing act, (Ch. 352, p. 1226, Stats.1935, as amended 1937, referred to as Unemployment Reserves Act) and that it has not paid the tax for which recovery is sought. The amount sought (\$478.68) is within the monetary jurisdiction of the municipal court. The complaint did not disclose that the "legality of any tax" was involved, so that as far as the complaint is concerned, the action was within the jurisdiction of the municipal court. But the answer "denies that said defendant ever has been an 'employer' within the definition of that term" as set forth in the taxing act. Whether defendant's employees were agricultural or horticultural workers, or whether they could be classified as domestic servants, were questions directly involved in the issues raised by the complaint and answer; that is, whether they were subject to the provisions of the tax.

The exact nature of the controversy as developed in the municipal court is made clear by the provisions of the taxing statute and the provisions of the Agreed Statement of Facts upon which this appeal is taken. It appears that sec. 7 of the taxing act specifically excludes from its operation "agricultural labor" and "domestic service in a private home." St.1937, p. 2057. From the Agreed Statement of Facts it appears that the taxing authorities, purporting to exercise their rule making authority, in January of 1936 adopted a series of rules purporting to define the above quoted terms. Under the definitions then adopted, the appellant was not subject to the tax. Thereafter, in February of 1937, the taxing authority purported to amend the rules so as to redefine the terms, which then attempted to include appellant within the definition of a taxable employer. The major controversy is, whether the taxing power properly adopted its amended rules, which, in turn, depends upon the proper legal interpretation of the terms as used in the act.

Thus, the controversy in the municipal court involved the validity of the amended rules and the interpretation of the taxing statute. The question thus presented is whether such a controversy involves the "legality of any tax" as those words are used in sec. 89 of the Code of Civil Procedure denying jurisdiction over such a

controversy to the municipal court. The attorney general argues that the phrase applies only to cases involving the "legality" of the taxing statute, and does not apply to cases involving the validity of the levy of the tax as applied to a particular taxpayer—that is, does not apply to a case where the question is whether a particular taxpayer, or a particular tax, comes within the taxing statute.

[16] To reach the construction contended for by the attorney general, it is necessary to read into the phrase "legality of any tax" the word "statute", so that the phrase would read "legality of any tax statute." The phrase under consideration is "the legality of any tax"; not "the legality of any tax statute." The "legality" of a "tax" is involved when the taxpayer contends that the tax is illegally assessed or levied against him. It is the essence of the contention of the taxpayer in such a situation that the tax is illegal. To say that such a case does not involve the "legality" of a "tax," is to fail to give effect to the language used in the statute.

[17,18] Practical considerations lead to the same conclusion. The provision was inserted in the Municipal Court Act for the same reason that the Supreme Court is given, by art. VI, sec. 4, of the Constitution, appellate jurisdiction of such cases. The intent was that municipal courts should not decide such cases because there would then be no appeal to the higher appellate courts. Most tax cases are test cases. Few involve the validity of the statute. Most tax cases involve the interpretation of the taxing statute and the legality of a levy against a particular taxpayer. It is in the public interest that the Supreme Court should decide such cases in order that such questions can be finally determined for the entire state. If it should be held that municipal courts have jurisdiction of such cases with appeal to the appellate department of the superior court there would be no way of securing a decision that would be binding authority in the state. On close questions there would always be the possibility of conflicting decisions with consequent confusion in the enforcement of tax statutes. It was undoubtedly for these reasons that the Legislature saw fit to deny jurisdiction of such cases to municipal courts. The provisions of the Constitution, or of a statute, should receive a practical, rather than a technical, construction (Reuter v. Board of



Supervisors, 220 Cal. 314, 30 P.2d 417); one leading to a wise policy rather than of "mischief or absurdity." *Bakkenson v. Superior Court*, 197 Cal. 504, 510, 241 P. 874, 877; see, also, *McMillan v. Siemon*, 36 Cal.App.2d 721, 98 P.2d 790.

[19] As was said in *City of Madera v. Black*, supra, 181 Cal. page 311, 184 P. page 400, in referring to the very phrase in question: "The general purpose of that provision [imposing a tax or impost] obviously is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, it is apparent that the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs. The conclusion necessarily follows that the particular charge here involved comes within the constitutional provision and that any case in which the legality of such a charge is involved is within the exclusive original jurisdiction of the superior court. Upon the filing of the answer it fully appeared that the legality of the charge was involved in the action. The recorder should thereupon have certified the papers and transferred the cause to the superior court." The phrase appears in the constitutions and statutes of several of the states. There are a few states that have followed the lead of Arizona (*State v. Downen*, 17 Ariz. 365, 152 P. 857; *Fee v. Arizona State Tax Commission*, 55 Ariz. 67, 98 P.2d 467) and hold that the phrase "legality of any tax" limits jurisdiction to cases involving the legality of the taxing statute, and does not extend jurisdiction to cases involving the legality of the levy or assessment. Other states have followed the well reasoned cases in Louisiana (*State ex rel. Grosjean v. Standard Oil Co. of La.*, 182 La. 577, 162 So. 185; *State v. Whitehead Motor Co.*, 179 La. 710, 154 So. 912; *State v. Armbruster*, 174 La. 41, 139 So. 753; *State v. Rosenstream*, 52 La. Ann. 2126, 28 So. 294), and hold that while the phrase in question does not extend jurisdiction over cases involving merely the computation of the tax, it does extend jurisdiction over cases involving the validity of the levy and the interpretation of the taxing statute. See, generally, *Unemployment Compensation Commission v. Harvey*, 179

Va. 202, 18 S.E.2d 390; *City of Independence v. Hindenach*, 144 Kan. 414 [61 P.2d 124, 107 A.L.R. 645; *Bank v. County Court*, 36 W.Va. 341, 15 S.E. 78. For reasons already stated, we believe that, if the language involved be given its ordinary meaning, there can be no doubt but that cases involving the legality of a particular levy fall within the phrase.

[20] From the foregoing it follows that the municipal court had no jurisdiction to try the issue presented. Exclusive trial jurisdiction of the controversy rests in the superior court. That jurisdiction has never been exercised. As the case now stands, it was erroneously tried in the municipal court, and appealed to the appellate department of the superior court. That court, in the exercise of its appellate jurisdiction, reversed the municipal court. The cause now rests in the municipal court. Under the mandatory provisions of section 396 of the Code of Civil Procedure that court must now transfer the cause to the superior court so that the latter court may exercise its original trial jurisdiction. The purported trial in the municipal court and the purported appeal to the appellate department of the superior court were void as beyond the jurisdiction of the respective courts.

The Supreme Court and the District Courts of Appeal being without jurisdiction to entertain the present appeal, it is ordered dismissed.

PETERS, P. J., concurred.

KNIGHT, Justice (concurring and dissenting).

I concur in that portion of the foregoing opinion which holds that no appeal lies from the judgment of reversal rendered by the appellate department of the superior court and that therefore the present appeal must be dismissed for want of jurisdiction to entertain it; but I do not concur in the remaining portion thereof whereby after rejecting the appeal the opinion goes on to consider a controlling issue in the case and to decide that issue contrary to the conclusion reached thereon by the superior court in the exercise of its appellate jurisdiction, namely, whether the cause of action sued upon was such as fell within the jurisdiction of the municipal court to hear and determine. In fact, as will be

noted, the opinion goes much further and assumes to adjudge that "The purported trial in the municipal court and the purported appeal to the appellate department of the superior court were void as beyond the jurisdiction of the respective courts," and in mandatory terms directs that the municipal court "must now transfer the cause to the superior court so that the latter court may exercise its original trial jurisdiction."

Ostensibly the effect of the above portion of the opinion is to nullify with directions the very judgment which this court holds it is without jurisdiction to review. However, if this court is correct in holding that it is without jurisdiction to consider the appeal, it must follow necessarily that it may not thereafter clothe itself with jurisdiction to adjudicate any of the controlling disputed issues presented by the abortive appeal; and that whatever it may say in that behalf must be deemed pure obiter dictum, and therefore not binding on either of the parties to the action or either of the courts against which it is directed; nor, assuming that the directions given therein be followed, would the obiter dictum become the law of the case so as to be binding on whatever appellate court may be called upon hereafter to review the same disputed question on an appeal from the judgment to be rendered by the superior court in the exercise of its original jurisdiction.

Irrespective, however, of the question of the binding effect of the obiter dictum, I disagree with the conclusion reached therein that all proceedings had in the municipal court, and those had subsequently in the superior court in the exercise of its appellate jurisdiction, were void. In order to reach that conclusion it was necessary to hold primarily that the action was one involving the "legality" of a tax, as that term is employed in section 89 of the Code of Civil Procedure; and in so holding the main opinion follows a rule of construction declared in a group of Louisiana cases, which are apparently conflicting with earlier decisions of that state, and which rule is obviously contrary to the one declared and followed universally in several other jurisdictions, including the federal. It is my view that the rule followed in these latter jurisdictions is not only sustained by the weight of authority but is the proper one to be applied in determining when an ac-

tion involves the legality of a tax. Briefly stated, the rule is this: That an action does not involve the legality or validity of a tax unless the question is raised as to the *power* of the legislative body to enact the law or to impose the tax; and that where the issue to be tried pertains only to an interpretation, construction or application of particular provisions of a law admittedly valid, it cannot be said that the action involves the legality or validity of the tax imposed thereby. Among the jurisdictions applying that rule is Arizona, wherein there exists a constitutional provision containing a clause framed in language substantially the same as that embodied in our section 89 of the Code of Civil Procedure; and in the several cases in which the Supreme Court of that state has been called upon to deal with the question it has cited authorities from the various other jurisdictions which have adopted and followed the same rule. One of the Arizona cases is *State v. Downen*, 17 Ariz. 365, 152 P. 857, 858, wherein the court said: "The 'validity of a tax, impost, assessment, toll, municipal fine, or statute,' as used in the Constitution, has reference to the power to impose the tax, impost, assessment, toll, or fine, or the power of the Legislature to enact the statute involved, and has no reference to the construction of a concededly valid law or statute by which the tax, impost, assessment, toll, or fine is imposed," citing *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 9 S.Ct. 503, 32 L.Ed. 908; *Doty v. Krutz*, 13 Wash. 169, 43 P. 17; *Standard Oil Co. v. Angevine*, 60 Kan. 167, 55 P. 879. In a later case, *Fee v. Arizona State Tax Commission*, 55 Ariz. 67, 98 P.2d 467, the same doctrine is quoted and the following additional authorities are cited in support thereof: *Sylvester v. Franklin County*, 90 Wash. 648, 156 P. 843; *Town of Colonial Beach v. De Atley*, 154 Va. 451, 153 S.E. 734; and in an earlier case, *Boehringer v. Yuma County*, 15 Ariz. 546, 140 P. 507, 508, the court after stating the same general rule and citing other and different authorities, quotes the following from a Washington case (*Doty v. Krutz*, supra): "Whether an action is properly brought under a statute, whether a recovery can be had under a statute, or whether there is any statute governing a particular action, are all questions of the construction of statutes, but are not questions which go to the validity of a statute." The Arizona

court then goes on to say: "If statutes are constitutional in themselves, the fact that they have been misconstrued or misapplied by the inferior tribunal is not sufficient to invoke the jurisdiction of this court," citing *State v. Third Justice of Peace*, 12 La. Ann. 789; *Police Jury v. Villaviabo*, 12 La. Ann. 788; *State v. Marshall*, 47 La. Ann. 646, 17 So. 202.

An examination of the decisions rendered in *City of Madera v. Black*, 181 Cal. 306, 184 P. 397, and *City of Independence v. Hindenach*, 144 Kan. 414, 61 P.2d 124, 107 A.L.R. 645, cited in the main opinion, discloses that neither applied any rule different from that stated in the Arizona cases. In the *City of Madera* case the determinative question urged and considered was as to the power of the legislative body of the city of Madera to enact a certain ordinance affecting the entire city; moreover it was expressly averred in the demurrer that the action involved the legality of a tax and consequently was triable in the superior court; and upon the filing of the answer the defendant demanded that it be certified to the superior court. Likewise in the Kansas case the controlling issue presented was as to the power of the legislative body to pass the ordinance. In the Virginia case, also cited in the main opinion (*Unemployment Compensation Commission v. Harvey*, 179 Va. 202, 18 S.E.2d 390), the statute considered was essentially different from our code section 89 in that it included "controversy \* \* \* involving the construction of any statute, ordinance, or county proceeding imposing taxes" etc. Code, § 6336. (italics added); and the West Virginia case (*Bank v. County Court*, 36 W.Va. 341, 15 S.E. 78) has little if any bearing whatever on the precise point here under discussion.

It is true that the group of Louisiana cases cited in the main opinion do hold that where an action involves the interpretation, construction or application of the provisions of a tax law, the action involves the validity or legality of the tax, notwithstanding that it is conceded that the law imposing the tax is valid and no question is raised as to the power of the legislative body to enact the law or impose the tax provided for therein. But as stated, in earlier cases the courts of that state apparently applied the doctrine universally adhered to in the other jurisdictions. Among those earlier cases are *Second Municipality v. Corning*, 4 La. Ann. 407; *State*

*v. Rebassa*, 9 La. Ann. 305; *State v. Third Justice of Peace*, supra; *State v. Marshall*, supra; *Police Jury v. Villaviabo*, supra. In that situation, and since the plaintiff herein has definitely taken the position that the municipal court had original jurisdiction, I am unwilling, in the present proceeding, in the absence of compelling reasons, to join in the obiter dictum repudiating the doctrine universally followed in the various jurisdictions above mentioned, and to stand committed to a contrary doctrine declared by a group of cases from a state wherein there exists an apparent conflict in the decisions.

Here the record shows the following: The action was brought in the municipal court by a state agency to recover the sum of \$478.68 and interest claimed to be due under the provisions of a statute known as the California Unemployment Reserves Act, it being alleged in the complaint that the defendant's employees were subject to the provisions of the act. Among the classifications of labor expressly exempted from the operation of the act are (a) agricultural labor and (b) domestic service in private homes. The defendant denied the allegations that its employees were subject to the provisions of the act and claimed that under the peculiar arrangement whereunder the men were employed and the character of the work they performed, they were brought within the exempted classification. At no time did defendant urge by way of pleading or otherwise that the Unemployment Reserves Act or any of its provisions were unconstitutional, or for any reason invalid, or that the Legislature was wanting in power to enact the law or to impose the taxes provided for therein. Thus the municipal court was called upon to decide a pure question of fact and the evidence was directed to that one issue. The evidence consisted of an agreed statement of facts, and the municipal court found therefrom that the facts were such as brought the employees within the exempted classifications, and accordingly gave judgment for the defendant. The plaintiff, claiming that the municipal court's decision was contrary to the facts, appealed to the appellate department of the superior court, and the appeal was presented on the same agreed statement of the facts. At no time on the appeal was it contended that the law was invalid, or that the Legislature was without power to enact it or to impose the



taxes therein provided for. Therefore, the only question submitted to the appellate department of the superior court was whether under the peculiar facts of this particular case the municipal court was legally justified in holding that said employees were brought within the exempted classifications; and the judgment of the municipal court was reversed. Two written opinions were filed, the second being a concurring opinion by the presiding judge, and as shown by both opinions, the only question urged on the appeal, and considered and determined by the superior court was whether, under the admitted facts, the character of the work performed by said employees and the nature of their employment brought them within either of the two exempted classifications.

Subsequent to the entry of its judgment of reversal the superior court denied defendant's petition for rehearing. No part of the petition is included in the record before us, nor is there anything therein to show upon what grounds the petition was based. It appears inferentially from plaintiff's brief that when the petition for rehearing was presented, defendant for the first time contended that the action involved the legality of a tax and that therefore the municipal court was without jurisdiction to hear the action; but even so, nowhere in the record before us does it appear that defendant has ever made the claim that the law is unconstitutional or invalid or that the Legislature did not have power to impose the taxes provided for therein. Defendant's sole contention was, and now is, that the municipal court was right and that the appellate department of the superior court was wrong in their respective determinations of the issue of whether under the admitted facts the work defendant's employees had been performing excluded them from the two exempted classifications set forth in the statute. Such being the state of the record, it is my conclusion that the appellate department of the superior court properly refused to vacate and set aside its judgment of reversal and acted entirely within the scope of its appellate jurisdiction in disposing of the appeal. I therefore limit my concurrence in the main opinion to that portion thereof which holds that the present appeal should be dismissed for want of jurisdiction to entertain it.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

**In re HYLAND'S ESTATE.**

**JAMISON v. WELLS FARGO BANK &  
UNION TRUST CO. et al.**

**WARD v. SAME.**

**Civ. 12020, 12021.**

District Court of Appeal, First District,  
Division 1, California.

May 11, 1943.

Hearing Denied July 8, 1943.

**1. Wills ⇐684(7)**

In the absence of express provision in the will to the contrary, the beneficiaries are entitled to receive income from date of death of testator, irrespective of whether the trust is one for maintenance and support or not. Probate Code, §§ 160, 163.

**2. Wills ⇐684(7)**

Title under a testamentary trust vests as of the date of death of testator and trustee's title and that of the beneficiary vest as of that date, and life tenant is therefore entitled to income from date as an incident of that title. Probate Code, §§ 160, 163.

**3. Wills ⇐684(7)**

Under a will giving two-thirds of residue to trustees with directions to pay the net income therefrom to the beneficiaries named for their support, beneficiaries were entitled to their respective portions of income of the trust from date of death of testatrix and not only from date of distribution to trustees by executors. Probate Code, §§ 160, 163.

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Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Annie E. Hyland, wherein the Wells Fargo Bank & Union Trust Company and another, as trustees of the trust created by the last will and testament of Annie E. Hyland, deceased, filed their first accounts as trustees with petitions for instructions from the court as to whether beneficiaries were entitled to be paid their respective portions of income of trust from date of death of testatrix or from date of distribution. From a determination that bene-

ficiaries should be paid income from date of distribution, Walter Keith Jamison, beneficiary, and John H. Ward, as executor of the last will and testament of Mabel Jamison Ward, deceased, beneficiary, appeal.

Reversed.

D. T. Jenkins, of San Jose, for appellant.

Gregory, Hunt & Melvin, of San Francisco, for respondent Hanlon.

Heller, Ehrman, White & McAuliffe and Joseph Toohig, all of San Francisco, for respondents Wells Fargo Bank & Union Trust Co. and Jamison.

PETERS, Presiding Justice.

Walter Keith Jamison, appellant in action No. 12,020, and Mabel Jamison Ward, whose executor is appellant in action No. 12,021, and the decedent Annie E. Hyland were brothers and sisters. Walter and Mabel survived Annie. The latter died testate devising two-thirds of the residue of her estate to trustees for the use and benefit of Walter and Mabel. In due course the estate was distributed to the trustees. Thereafter, the trustees filed their first accounts together with petitions for instructions from the court. The trustees desired instructions on the question as to whether the two beneficiaries of the trust were entitled to be paid their respective portions of the income of the trust from the date of the death of the testatrix or from the date of distribution. The trial court held that they should be paid income from the date of distribution. From that determination the beneficiaries separately appeal.

The will provided that the residue of the estate was bequeathed one-third to her niece and two-thirds to the trustees. The trusts relating to appellants read as follows:

"(b) One-third (1/3) thereof unto my trustees hereinabove named, in trust, nevertheless, for the following uses and purposes: To pay the net income, revenue and profit therefrom, together with as much of the corpus and principal as may be necessary for his maintenance and support, monthly, unto my brother, Walter Keith Jamison. Upon his death, the sum of Five Hundred Dollars (\$500.00) shall be paid from the corpus and principal thereof unto his daughter, Melba Jamison, and the remainder thereof shall be subject to the provisions of paragraph (d) below:

"(c) One-third (1/3) thereof unto my trustees hereinabove named, in trust, nevertheless, for the following uses and purposes: To pay the net income, revenue and profit therefrom, together with as much of the corpus and principal as may be necessary for her support, monthly, unto my sister, Mabel Jamison Ward. Upon her death, the remainder thereof shall be subject to the provisions of paragraph (d) below."

It is to be noted that, so far as the bequest to Walter is concerned, the will provides that as much of the corpus of the trust "as may be necessary for his maintenance and support" is included, but there is no reference in the will to the bequest of income being for such purposes. The provision for Mabel is the same, except that the word "maintenance" is omitted. The decree of distribution follows the language of the will.

The testatrix died in 1938. The decree of distribution was made November 14, 1939. Income on each interest from the date of death to the date of distribution amounts to \$3,578.81. There was no direct language in the will indicating any intent as to when the right to income should accrue. The extrinsic evidence was conflicting as to whether the beneficiaries, prior to the testatrix' death, were dependent upon her.

[1,2] At the time these cases were tried and the appeals taken, there was considerable confusion in the law of this state as to whether beneficiaries of trusts not for maintenance and support, in the absence of an expression of intent on the part of the testator, were entitled to income from the date of the death of the testator, or from the date of distribution. There was substantial authority that in such circumstances the right to income dated from the date of the decree of distribution. The decree here appealed from, holding that the right to income dated from distribution, was predicated on those cases. However, the Supreme Court has recently overruled those cases and brought the rule in California into accord with what it held to be was the weight of authority elsewhere. Estate of Platt, 21 Cal.2d 356, 131 P.2d 825. In that case, as here, the trusts were not for maintenance and support. As here, there was nothing in the will to indicate the desires of the testatrix as to her intent. The Supreme Court pointed out that the

majority rule elsewhere, and the rule of the Restatement of the Law of Trusts, § 234, is that in the absence of express provision in the will to the contrary the beneficiaries are entitled to receive income from the date of the death of the testator, and that this rule applies whether or not the trust is one for maintenance and support. The opinion of the Supreme Court points out that under the law of this state the title under a testamentary disposition vests as of the date of death of the testator, that as a result the trustee's title and that of the beneficiary vest as of that date, and concludes that the life tenant is therefore entitled to income from that date as an incident of that title. It is held that this conclusion is made conclusive by the express language of § 160 of the Probate Code, a section apparently overlooked in the cases adopting the minority view and which are overruled by the Supreme Court.

[3] In an attempt to distinguish the Platt case, *supra* at the oral argument counsel for respondents argued that § 160 of the Probate Code only applies where there is a bequest of the "income of a certain sum or fund" to trustees, and urged that the present bequest is not of such a nature. Section 160 provides that: "In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death." By the provisions of § 163 of the Probate Code it is provided that the intention of the testator if expressed controls as to the time the right to income accrues. Respondents argue that the Supreme Court did not overrule *Estate of Brown*, 143 Cal. 450, 77 P. 160; *Clayes v. Nutter*, 49 Cal.App. 148, 192 P. 870, and *In re Mackay's*, *Estate* 107 Cal. 303, 40 P. 558, in the Platt case, and from that premise contend that the court must have felt either that a bequest of a portion of the residue of an estate is not a bequest of a certain fund, or that such a bequest indicates an intention under § 163 not to have the right to income vest until distribution. The language of the Supreme Court in reference to this point is as follows (21 Cal.2d at page 362, 131 P.2d at page 829): "Insofar as *Fraser v. Carman-Ryles*, [8 Cal.2d 143, 64 P.2d 397] *supra*, *Estate of Watson*, [32 Cal.App.2d 594, 90

P.2d 349] *supra*, *Estate of Lockhart*, [21 Cal.App.2d 574, 69 P.2d 1001] *supra*, and the language of *Estate of Bourn*, [25 Cal. App.2d 590, 78 P.2d 193] *supra*, as well as any other cases in this State, are inconsistent with the rule of section 160 of the Probate Code as interpreted herein, they are expressly disapproved. The cases of *Clayes v. Nutter*, 49 Cal.App. 148, 192 P. 870, and *Estate of Mackay*, 107 Cal. 303, 40 P. 558, present situations similar to that of *Estate of Brown* [143 Cal. 450, 77 P. 160], *supra*, and the conclusions reached in them are justified by the facts concerning the expressed intention of the testator. Prob. Code, § 163. In each of these three cases, under the provisions of the will the terms of which were in controversy, there could be no income available for distribution until a specified amount of money was distributed to the trustees and subsequently invested by them."

It is quite apparent that the Platt case cannot thus be distinguished. In that case, as in the instant case, the will contained certain specific bequests and the balance of the estate was bequeathed to trustees. The only difference between the cases is that in the Platt case the entire residue was bequeathed to trustees with instructions to pay the wife \$250 per month from the income of the trust, the next \$250 per month of the income to go to the son, and the balance to be equally divided, while in the instant case one-third of the residue was bequeathed to a named legatee, one-third to the trustees with directions to pay the income to Walter, and one-third of the residue to the trustees with directions to pay the income therefrom for the benefit of Mabel. There is no logical reason why such a bequest as is here involved should be governed by rules different from those stated in the Platt case. There is nothing in either type of bequest to indicate any expressed intent on the part of the testator within the meaning of § 163 of the Probate Code. That being so, the rule of the Platt case is here controlling.

The portions of the decree appealed from are reversed.

KNIGHT and WARD, JJ., concur.



**WESTERN HARDWOOD LUMBER CO. v.  
CALIFORNIA EMPLOYMENT COM-  
MISSION et al.**

**E. J. STANTON & SON v. SAME.**

**HAMMOND LUMBER CO. v. SAME**  
(two cases).

**HAYWARD LUMBER & INVESTMENT CO.  
v. CALIFORNIA EMPLOYMENT  
COMMISSION et al.**

Civ. 13526-13530.

District Court of Appeal, Second District,  
Division 1, California.

April 28, 1943.

As Modified May 12, 1943.

Rehearing Denied May 25, 1943.

Hearing Denied June 24, 1943.

**1. Master and servant ⇨73**

Where referee reversed determination made by adjustment unit and ordered unemployment benefits to be made to claimants, Employment Commission was compelled under Unemployment Insurance Act to make the benefit payments regardless of any appeal thereafter taken. Gen.Laws Supp.1939, Act 8780d, § 67.

**2. Master and servant ⇨78**

The power of offset or recoupment of unemployment benefits erroneously paid to claimants under mandatory provisions of Unemployment Insurance Act, which was granted to Employment Commission by virtue of certain provisions of the act prior to their repeal in 1939, was withdrawn from commission by amendment of provisions granting such powers. St.1937, p. 2059, §§ 66, 67; p. 2078, § 58(e); Gen. Laws Supp.1939, Act 8780d, § 67.

**3. Appeal and error ⇨1107**

A reviewing court must dispose of a case under the law in force when its decision is rendered.

**4. Statutes ⇨267(2)**

The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where repeal finds them.

**5. Statutes ⇨267(2)**

The repeal of a statute takes away all remedies afforded by such legislation and defeats all actions pending under it at time of the repeal.

**6. Mandamus ⇨73(1)**

Mandamus would not issue to compel Employment Commission to proceed to recoup payment of unemployment benefits paid to claimants under mandatory provision of Unemployment Insurance Act following referee's allowance of benefits, which payments were thereafter held erroneous on appeal, since commission was without jurisdiction under the act after 1939 amendment to so proceed. St.1937, p. 2059, §§ 66, 67; p. 2078, § 58(e); Gen. Laws Supp.1939, Act 8780d, § 67.

**7. Constitutional law ⇨275(2)**

**Master and servant ⇨11**

The construction of Unemployment Insurance Act as amended in 1939 as not authorizing Employment Commission to proceed to recoup payment of unemployment benefits, which were paid under mandatory provision of the act following referee's allowance of benefits, and which were thereafter determined to have been erroneous on appeal, would not render act unconstitutional as depriving employers who were compelled to contribute to fund of property without "due process of law". Gen.Laws Supp.1939, Act 8780d, § 67.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

**8. Master and servant ⇨78**

The provision of Unemployment Insurance Act that, if referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal thereafter taken, provides for protection of employer in that it directs Employment Commission to cancel any charge made against employer's account with respect to challenged payments and to make no entries in such books and records charging any such payments against employer's account if payments are thereafter determined to be erroneous on appeal. Gen.Laws Supp.1939, Act 8780d, § 67.

**9. Appeal and error ⇨1179**

Generally, appellate tribunals have power not only to reverse an erroneous judgment, but to restore to aggrieved party that which he has lost in consequence of such judgment.

**10. Master and servant ⇨78**

Employment Commission had no inherent right to recover benefit funds from,

claimants who received them pursuant to an erroneous adjudication by the commission, in view of provisions of Unemployment Insurance Act as amended in 1939 and purposes of the act. Gen.Laws Supp. 1939, Act 8780d, §§ 1, 67.

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Appeal from Superior Court, Los Angeles County; Emmet Wilson, Judge.

Consolidated mandamus proceedings by Western Hardwood Lumber Company against California Employment Commission and others and Carl Wright and others; by E. J. Stanton & Son against California Employment Commission and others and Harry Bentley Smith and others; by Hammond Lumber Company against California Employment Commission and others and Donald Canode Myers and others; by Hammond Lumber Company against California Employment Commission and others and R. Vicario and others; and by Hayward Lumber & Investment Company against California Employment Commission and others and Fred Keelan and others. From judgments entered and peremptory writs of mandate issued thereon, the California Employment Commission and others appeal.

Judgments and peremptory writs of mandate issued thereon modified, and, as so modified, affirmed.

Earl Warren, Atty. Gen. of the State of California, Burdette J. Daniels, Deputy Atty. Gen. (Maurice P. McCaffrey, Forrest M. Hill, Glenn V. Walls, Doris H. Maier, and Elizabeth M. Doyle, all of Sacramento, of counsel), for appellants.

Horton & Horton, Paul G. Henderson, Gerald E. Kerrin, and Philip T. Lyons, all of Los Angeles, for respondents.

Gladstein, Grossman, Margolis & Sawyer, of San Francisco, amici curiae on behalf of appellants.

WHITE, Justice.

This is an appeal from judgments and the peremptory writs of mandate issued thereon. It comes before us on the judgment rolls which consist of the petitions for writs of mandate, demurrers thereto, judgments and the peremptory writs.

All of the causes herein considered have, for the purpose of appeal, been consolidated for the reason that the identical question of law has arisen in each of them.

For convenience the term "petitioners" will be utilized to designate those employers who seek the writs of mandate in the present proceeding; the term "respondent" will refer to California Employment Commission; and the term "co-respondents" will be used to designate the employees who are affected by the order of respondent commission.

Each petitioner is a corporation engaged in the retail lumber business in the general vicinity of Los Angeles; was an "employer" within the meaning of that term as it is defined by the California Unemployment Insurance Act, Stats. 1935, Chap. 352, as amended; Deering's Gen.Laws, Act 8780d; Deering's 1939 Supplement, page 1697; and at all times since January 1, 1936, has paid contributions, maintained records and filed reports as required by said act. As workmen employed by petitioners, the co-respondents are subject to the provisions of the aforesaid act, under the terms of which a percentage of their earnings is deducted and paid into the unemployment fund, and this money, together with contributions from petitioners, as employers, is used to pay benefits to unemployed workers. Respondent commission administers the act.

During June of 1939, two unions whose membership embraced a different grade and class of workers than did the unions to which co-respondents were affiliated, and of which unions co-respondents were not members, called a strike against petitioners. Picket lines were established at each of petitioners' places of business by the striking unions. The co-respondents herein did not go on strike against petitioners, but from approximately June 17th to July 27th, 1939, were unemployed solely because they refused to pass through the picket lines which the striking unions had established around petitioners' places of business. The co-respondents claimed unemployment benefits under the aforesaid act. Such a claim is initiated by the unemployed workman making application for such benefits. Determination of such claim is made in the first instance by the Adjustment Unit, provided for in the act, which is referred to as the lower tribunal. If payment is ordered in the first instance, any employer whose reserve account is affected by the payment may intervene and appeal, whereupon payment will be stayed pending such appeal. If payment of benefits is denied by the Adjustment Unit, the employee affected thereby may appeal. To

hear such appeals a referee is appointed by the commission. Such hearing is conducted in the manner usual to such commission hearings, affording full opportunity to produce evidence and examine witnesses. The referee makes written findings and his decision becomes final, subject to an appeal to the commission. In the instant case, the Adjustment Unit of the Department of Unemployment Insurance (the lower tribunal) denied co-respondents benefits and these decisions were appealed to a referee who reversed the determination of the Adjustment Unit. An appeal was taken by petitioners to the Commission, and that body, with one member thereof dissenting, affirmed the decision of the referee, holding that the co-respondents were entitled to benefits. In accordance with such decision, benefits were paid to the co-respondents.

It might here be appropriate to note that at the time the payments of unemployment benefits with which we are here concerned were made to co-respondents, section 67 of the act as amended in 1937, St.1937, p. 2059, read in part as follows: "*\* \* \* provided, that if a referee affirms a decision of a deputy, or the commission affirms a decision of a referee, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed no employer's account shall be charged with benefits so paid as to which the decision was reversed.*"

In September, 1939, said section 67 was amended to eliminate therefrom one of the "double affirmance" provisions, viz., the clause providing for the mandatory payment of benefits where the referee's decision was affirmed by the commission. However, the portion of the section which provided that where a referee affirmed an initial determination awarding benefits the payment thereof was mandatory, was retained.

After payment of the aforesaid benefits commenced, petitioners filed petitions seeking writs of mandate to compel the commission to set aside and vacate its decisions in the cases of co-respondents, to take all such steps as might be proper to make the unemployment trust fund whole, to correct the books and records of the commission and to remove and cancel any charges made against the accounts of petitioners with respect to any payments made to co-respondents regarding their un-

employment for the period here in question.

After the filing of demurrers by the commission the cause came on for hearing at which time it was stipulated that the demurrers be overruled, that petitioners have judgments that the peremptory writs issue commanding the commission to set aside and vacate its decisions granting co-respondents unemployment benefits; to remove and cancel charges made against petitioners' accounts with respect to payments made to co-respondents for the period in question; but *reserving however the question as to whether the commission should be required to take such steps as might be proper to make the unemployment trust fund whole by reason of its depletion through payment of such benefits.*

Thereafter the court rendered judgments and ordered issuance of the peremptory writs requiring the commission to do all of the things stipulated to and further *directing the commission to take such steps as might be proper to make the unemployment trust fund whole.*

It is to the above italicized portion of the judgments that appellant commission directs its attack upon this appeal.

It is conceded herein that under the holding by our supreme court in *Bodinson Mfg. Co. v. California Employment Commission*, 17 Cal.2d 321, 109 P.2d 935, there was no statutory authority for the awards of benefits made to co-respondents by reason of the provisions of section 56 of the act and that such awards should be annulled, but appellants insist that the provision contained in the writs commanding the commission to "take all such steps as might be proper to make the unemployment trust fund whole by reason of the erroneous payment of unemployment benefits to co-respondents" is erroneous and can not be sustained on the grounds that (1) the payments were made mandatory by section 67 of the unemployment insurance act; (2) there is no duty, power or right inherent in the commission to recoup such benefit payments; and (3) the language of the judgments and the writs issued thereon is so uncertain and ambiguous that compliance therewith by appellants is not possible.

Of their theory of the case, petitioners say it "is based upon the premise that the commission has the power to do everything necessary and proper to carry out the intent and purposes of the act and that



where the commission has erroneously paid unemployment benefits to ineligible persons, such acts \* \* \* depleted the unemployment trust fund in which respondents (as employers) have a vested interest and the commission has the power to make said trust fund whole by recovering such erroneous payments from the co-respondents (employees)"; and that the provision in the writs to which appellant takes exception "guards the unemployment trust fund from whim, caprice or erroneous rulings which otherwise might deplete or even exhaust said trust fund."

[1] It is not denied, indeed it can not be questioned, that the payments made by the commission to co-respondents herein were mandatory in obedience to section 67 of the act. When the referee reversed the determination made by the Adjustment Unit and ordered payments to be made, the commission had no discretion and was not only authorized but compelled under the law to make the benefit payments. The finality of a referee's decision as far as the payment of benefits is concerned, was settled by the supreme court in the case of *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, at page 300, 109 P.2d 942, at page 953, 132 A.L.R. 715, wherein the court said: "The foregoing cases demonstrate the weakness of the argument that because a commission may make an occasional error in ordering some payment out of a public or semipublic fund, the courts must have the power to stay any and all payments during the lengthy period of judicial review. The legislature has concluded that it is wiser to have a system of unemployment compensation operating with a possible small percentage of error, than to have a system not operating at all. The legislative power to make such provision is unquestioned; the statutory language cannot be misunderstood; and for the courts that is the end of the matter." In the same case it was held that the judgment of the commission in favor of a claimant is prima facie evidence of his right to recover; that the prime object of the law in establishing the summary procedure set up therein indicates an intention upon the part of the legislature to furnish immediate relief to those unemployed, as part of a design to alleviate the evils of unemployment as part of a national plan of social security in the creation and operation of which federal and state legislation is coupled and united. If the beneficiary

of unemployment insurance payments be required to restore such payments to the state fund in the event of a later adverse decision by the courts, would not the very essence of the act which is its provision for the prompt payment of benefits for the immediate relief of those unemployed, at the time of their unemployment, be destroyed?

Respondents' claim that the moneys erroneously paid under the mandatory provisions of the act can be recovered on the theory that the state is not bound by the acts of its agents acting beyond the scope of their authority cannot be upheld. This we say because, although the payments were erroneously made it cannot be said that the payments were unauthorized. In view of the provisions of section 67 which under circumstances here present make benefit payments mandatory it must be held that such payments were made by "authority of law", by a tribunal possessed of jurisdiction in the matter and clothed with no other alternative than to make the payments in question. When, as was decided in *Abelleira v. District Court of Appeal*, supra, the payments of unemployment benefits cannot be stayed or enjoined pending judicial review, because if such were the case one of the prime objects and purposes of the law would practically be nullified, does it not also follow that the same result would ensue were the commission required to recoup such payments made pursuant to the law's mandate, against the beneficiaries thereof by legal action, or by charging their accounts therewith, thereby foreclosing them from obtaining further benefits through a period of subsequent unemployment until they became entitled to a sum equal to what had previously been erroneously paid to them, unless they restored the amount of such benefits to the fund?

That the legislative intent comports with the foregoing assumption seems manifest to us when we read section 66 of the act, which prior to its repeal in December, 1939, provided in part: "\* \* \* If benefits for total unemployment to which any claimant is not entitled are paid to him, *the amount of such benefits shall be deducted from any benefits to which the claimant may subsequently become entitled.* If the amount of such benefits can not be so deducted from benefits to which the claimant subsequently became entitled in the benefit year in which such benefits were erroneously paid, no employer's account

shall be charged therewith. \* \* \* St.1937, p. 2059. Furthermore, prior to its repeal on December 1, 1939, section 58(e) read in part as follows: " \* \* \* If partial benefits in excess of the amount to which any claimant is entitled are paid, as a result of the claimant's failure to accurately state in his claim the correct amount of wages so received, or otherwise, *the amount of such excess shall be deducted from any benefits to which the claimant may subsequently become entitled.* If such excess can not be so deducted from benefits to which the claimant subsequently became entitled in the benefit year in which such excess was paid, no employer's account shall be charged therewith."

[2-6] Applying the usual and ordinary rules of statutory interpretation to the foregoing repeals, it seems clear that it was the legislative intent to take from the commission such commutation or recoupment procedure. The power of offset or recoupment, which was granted to the commission by virtue of the provisions of the foregoing sections prior to their repeal, was withdrawn from the commission by the amendment of these sections. At the time the commission rendered its decisions in these cases, at the time the benefit payments were made and indeed, at the time the petitions for the instant writs of mandate were filed there was no provision in the California Unemployment Insurance Act providing for recoupment of benefits. It is the law that a reviewing court must dispose of a case under the law in force when its decision is rendered and the unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them, *People v. Lindheimer*, 371 Ill. 367, 21 N.E.2d 318, 124 A.L.R. 1473, 1478. It is the rule in California that repeal of a law or statute takes away all remedies afforded by such legislation and defeats all actions pending under it at the time of the repeal. *Pacific Gas & Electric Co. v. State of California*, 214 Cal. 369, 373, 6 P.2d 78; *Cook v. La Vina Land Co.*, 3 Cal.App.2d 21, 30, 39 P.2d 458; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 71, 112 P. 866, 37 L.R.A., N.S., 934, Ann.Cas. 1912B, 1148. Therefore, the commission being without jurisdiction under the law to proceed to recoup the erroneous payments by reason of the repeal of the legislation which clothed it with that power, it must be held that the commission is without statutory power, duty or authority to proceed as di-

rected by the writs of mandate herein "to take such steps as are proper to make the fund whole".

[7] Petitioners contend that unless the commission be required to recover the amounts paid as a result of its erroneous determination, the efficacy of a court review of the commission's action would be destroyed and rendered a nullity, as well as depriving petitioners of property without due process of law. It is argued by petitioners that as contributors to the unemployment trust fund and as taxpayers they have a vested interest in the fund and the right to insist that the commission, as custodian of said fund, take appropriate action to prevent depletion or exhaustion of the same through withdrawals therefrom in favor of those ineligible to receive such funds as benefits under the act. The soundness of this proposition admits of no question but the claimed injury to petitioners was thus answered by the supreme court in *Abelleira v. District Court of Appeal*, supra, 17 Cal.2d at page 297, 109 P.2d at page 951, 132 A.L.R. 715, wherein it is said:

"What injury do the employers show? They say that they will suffer in the event unauthorized payments are made to unemployed workers, because their accounts will be charged with such payments, and their reserve under section 39 of the act will be thereby decreased, with the ultimate result that they may in 1941 pay contributions at an increased rate. In examining this contention, we must remember just what the employers are trying to do. They are attempting to prevent payment of public funds in which they have no direct interest, by a body specially charged with the duty of making such payment. We held, in the *Bodinson Mfg. Co.* case, supra, [*Bodinson Mfg. Co. v. California Employment Comm.*, 17 Cal.2d 321, 109 P.2d 935], that they are aggrieved parties entitled to demand judicial review. But the question here is not whether they are aggrieved to the extent necessary to gain standing on appeal or review. The question is whether the payment of benefits at this time constitutes such an immediate and irreparable injury as to warrant the drastic step of interfering with an uncompleted administrative proceeding, in defiance of an established rule of jurisdiction. To this question there are several decisive answers.

"In the first place, their whole contention is purely speculative. The maximum con-

tribution which they can be required to pay under the statute is 2.07 per cent. This cannot be increased, and the extent of their possible injury would therefore be the loss of a hoped for lower rate under the so-called merit rating provision of the statute. This provision enables employers with a favorable employment experience to obtain a slightly lower rate of contribution, when their account on the commission books shows an excess of contributions over benefits paid. See secs. 39, 40, 41, St.1935, p. 1233, St.1939, p. 2147. But the narrow range in which the contribution rate fluctuates can be affected by a variety of circumstances and by numerous instances of unemployment. It cannot be determined at the present time whether this particular order of payment would, in the light of all the occurrences of the past year and any other period involved, actually result in a changed rate. See 88 Univ. Pa.L.Rev. 137, 142."

"Second, it is provided in section 67 of the act that in the event that any payments of benefits are found to be erroneous the particular employer's account shall not be charged with them. This being so, it is not clear how his contributions can be increased by the payments, since the factor determining the rate is made inapplicable in such event."

[8] It seems clear to us that the legislative intent was that when the award of the Adjustment Unit is affirmed or ordered by the referee the benefits begin for the beneficiary for whom this social legislation was primarily adopted, with that protection for the employer already noted in the quotation last made from *Abelleira v. District Court of Appeal*, supra, in the event of a later reversal of the award made by the commission. Section 67 of the act affords this protection, and that portion of the writs of mandate herein, the validity of which is conceded, provides for such protection when they direct that the commission correct its books and records to "remove and cancel any charges made against petitioner's account with respect to" the challenged payments, and "to make no entries in such books and records charging any such payments against petitioner's account".

[9,10] Petitioners urge that the commission inherently possesses the right to recover benefit funds from those who have received them pursuant to an erroneous adjudication by the commission. This argu-

ment is predicated upon the remedy well known to common law and universally recognized by statute, commonly referred to as the remedy of restitution. Generally speaking, it is a power reposed in appellate tribunals to not only reverse an erroneous judgment but to restore to the aggrieved party that which he has lost in consequence of such judgment. As we view petitioners' contention in this regard it is that in contemplation of law there was an implied promise on the part of the beneficiaries to return such benefit payments in the event the commission order awarding same to them be later reversed. Ordinarily it certainly must be conceded that when money is collected upon an erroneous judgment, which subsequent to the payment of the money is reversed, both equity and good conscience irresistibly dictate the legal conclusion that the money belongs to the person from whom it was collected. But in the instant case we are confronted with a situation wherein the legislature concluded, as stated by the supreme court in the case of *Abelleira v. District Court of Appeal*, supra, 17 Cal.2d at page 299, 109 P.2d at page 952, 132 A.L.R. 715, "on the basis of normal experience that the large majority of the administrative orders will be proper and that to permit this justifiable and necessary payments to be postponed for long periods would defeat the objectives of the act." At the time the Unemployment Insurance Act was before the legislature at its 1939 session the lawmaking body in its declaration of state policy as a guide to the interpretation and application of the act stated therein, Deering's 1939 Supplement, Act 8780d, page 1699, "The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." As heretofore narrated in this opinion, section 67 of the act makes payments thereunder mandatory, and if as stated by the supreme court in *Abelleira v. District Court of Appeal*, supra, such mandatory and authorized payments can not be stayed pending judicial review because to do so would in effect practically



nullify one of the prime objects and purposes of the law, then surely it must be said that if such payments are coupled with the obligation on the part of the beneficiary to make restitution in the event of a later reversal of the commission's decision by the courts, an equally great or greater hardship would be visited upon the claimant than would ensue from a long postponement of benefits under a stay order pending ultimate decision on appeal. Again, as stated by the supreme court in *Abelleira v. District Court of Appeal*, supra, 17 Cal. 2d at page 298, 109 P.2d page 952, 132 A. L.R. 715, "The very essence of the act is its provision for the prompt payment of benefits to those unemployed." We can find no warrant in the act for the assumption that the legislative purpose and intent was to do anything except what would alleviate the suffering occasioned by involuntary unemployment by making payments during the existence of such condition even though the validity of such payments might be in the process of debate in the courts, and that it was not intended to visit upon the unemployed beneficiary of the fund the burden and responsibility of refunding such payments if it was later determined that the commission, although acting in good faith, had misinterpreted the law. The repeal of the sections which conferred power of recoupment and to which we have heretofore alluded gives strength to the conclusion just announced as well as to a holding that both the purposes and objectives of the act as well as the legislative intent expressed therein indicate that the legislature after repealing the recoupment sections purposely refrained from providing any legal procedure or authorization by which the commission could recoup benefits paid under and in accordance with the express mandate of the statute as contained in section 67 thereof.

For the foregoing reasons, it is ordered that the judgments appealed from and the peremptory writs of mandate issued thereon be modified by striking therefrom the following language: "and to take all such steps as may be proper to make the unemployment trust fund whole by reason of the erroneous payment of unemployment benefits to said co-respondents in pursuance of such decision". As so modified the judgments, and each of them, are affirmed. Petitioners-respondents to recover costs on appeal.

YORK, P. J., and DORAN, J., concur.  
Hearing denied; CURTIS, J., dissenting.

**Ex parte HERRERA et al.\***

**Cr. 3675.**

District Court of Appeal, Second District,  
Division 3, California.

April 30, 1943.

Rehearing Denied May 14, 1943.

Hearing Granted May 27, 1943.

#### 1. Habeas corpus ☞9

A person on parole is not in "custody" in such sense as to entitle him to a writ of habeas corpus.

See Words and Phrases, Permanent Edition, for all other definitions of "Custody".

#### 2. Habeas corpus ☞9

A habeas corpus proceeding for release from custody of the Youth Correction Authority must be dismissed as involving a "moot question", where before the return petitioners were paroled by the Authority and released from custody. St. 1941, pp. 2529, 2531, §§ 1753, 1766.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

#### 3. Constitutional law ☞70(3)

In passing on the validity of the Youth Correction Authority Act, the court is not concerned with the wisdom or expediency of any of its provisions, such matters being solely of legislative cognizance. St. 1941, pp. 2522 to 2533, §§ 1700 to 1783.

#### 4. Statutes ☞64(1)

Where the different parts of a statute are independent of each other, and the manifest purpose of the legislature can be carried into effect by upholding and enforcing those provisions within its constitutional power, that purpose will not be defeated by the inclusion of an unconstitutional provision subsidiary in its nature.

#### 5. Statutes ☞64(6)

Though the provision of the Youth Correction Authority Act that unconstitutionality of any part of Act should not affect the validity of remaining portions could not be given literal effect as written, it indicated legislative intent and court was not required to decide upon the validity of every provision in the Act. St. 1941, p. 2533, § 3.

\* Subsequent opinion 143 P.2d 345.

**6. Statutes** ⇨64(1)

The court will not consider the asserted unconstitutionality of portions of an act which do not affect the rights of the party raising the question, in case such portions, if unconstitutional, would fall without affecting the validity of the remainder of the act.

**7. Constitutional law** ⇨48

All doubts are to be resolved in favor of the validity of a statute, and before an act can be declared invalid as in conflict with the Constitution, such conflict must be clear, positive and unquestionable.

**8. Constitutional law** ⇨208(1)

The legislature may classify for the purpose of meeting different conditions in order that legislation may be adapted to the needs of the people, but the classification must not be arbitrarily made, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation.

**9. Constitutional law** ⇨70(1)

The power of legislature to classify carries with it a wide discretion in the exercise thereof, and the decision of the legislature in that respect is ordinarily conclusive upon the courts.

**10. Constitutional law** ⇨48

Every presumption is in favor of the validity of a legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason.

**11. Constitutional law** ⇨211

"Equal protection of the laws" is not denied by a legislative classification which is not palpably arbitrary and may reasonably be conceived to rest on some real and substantial difference or distinction bearing a just and fair relation to the legislation. Const. Cal. art. 1, § 21; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

**12. Infants** ⇨69

The purpose of the Youth Correction Authority Act is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and

rehabilitation of young persons found guilty of public offenses. St.1941, p. 2522, § 1700.

**13. Constitutional law** ⇨208(1)

**Infants** ⇨69

**Statutes** ⇨72

The provision of the Youth Correction Authority Act authorizing the Authority to make arrangements with existing institutions for use of their facilities, and leaving to the Authority the determination whether its facilities are adequate and persons involved can be materially benefited, is not unreasonable, nor does it involve improper "classification" or forbidden "discrimination" between those to whom the law is immediately applicable and others who may be otherwise dealt with. St.1941, p. 2526, § 1731.5; Const. Cal. art. 1, §§ 11, 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Classification" and "Discrimination".

**14. Constitutional law** ⇨62

**Infants** ⇨69

The provision of the Youth Correction Authority Act delegating to the Authority the power to determine adequacy of facilities and probability of benefit to the person committed to the Authority is not an improper "delegation of legislative power", where the statute provided the primary standard to govern the action of the Authority. St.1941, p. 2526, § 1731.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Power".

**15. Constitutional law** ⇨62

Authority may be delegated by legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or facts upon the board or officer.

**16. Infants** ⇨69

The Youth Correction Authority Act is not arbitrary and void in that it subjects to its provision any offender less than twenty-three years of age and conflicts with statute fixing twenty-one as the age below which persons are minors for general purposes. Civ.Code, § 25; St.1941, pp. 2526, 2528, §§ 1731.5, 1732.

**17. Infants** ⚭

The age of majority is a matter of legislative regulation and legislature may prescribe a longer period of minority for some purposes than for others.

**18. Infants** ⚭69**Statutes** ⚭72, 87

The provision making the Youth Correction Authority Act applicable to all offenders who are less than twenty-three years of age, thus limiting the application of the Act to those who are in the formative period of development, is based on a reasonable "classification". Civ.Code, § 25; St. 1941, pp. 2526, 2528, §§ 1731.5, 1732; Const. Cal. art. 1, § 11, art. 4, § 25.

**19. Statutes** ⚭64(6), 72, 87

Under the Youth Correction Authority Act, felons constitute a class which is separable from the other persons subject to the Act, and validity of the Act as it applies to felons would not be affected by possible invalidity of its provisions regarding others. St.1941, pp. 2531, 2532, §§ 1766, 1768-1771, 1780-1782.

**20. Infants** ⚭69

The provision of the Youth Correction Authority Act that felons shall be discharged upon reaching age of twenty-five, unless such person is returned to the court for further action and court commits him to prison is not invalid on ground that it would impose a longer sentence, where time spent under control of the Authority is deducted from the maximum term. St.1941, pp. 2531, 2532, §§ 1766, 1768-1771, 1780-1782.

**21. Infants** ⚭69

Proceedings under the Youth Correction Authority Act are not to be regarded as punishment but as a means of reformation, correction and rehabilitation, and that under the Act one may be held in custody for a longer period than others convicted of the same offenses did not render the Act unconstitutional. St.1941, pp. 2530, 2531, §§ 1765, 1766, 1769.

**22. Constitutional law** ⚭62**Infants** ⚭69

The Youth Correction Authority Act which fixed the powers and duties of the Authority, provided what convicted persons shall be committed to it, and established by general rule the standards by which it shall determine what modes of treatment to apply and when committed persons shall be

released does not constitute an improper "delegation of legislative power". St.1941, pp. 2522 to 2533, §§ 1700 to 1783; Const. Cal. art. 3, § 1, art. 6, § 1.

**23. Constitutional law** ⚭271**Infants** ⚭69

The Youth Correction Authority Act is not a violation of "due process of law" on ground that it allows no appeal from the order committing a person to the Authority, since due process of law does not comprehend the right of appeal. St.1941, pp. 2522 to 2533, §§ 1700 to 1783; Const. Cal. art. 1, § 13; U.S.C.A. Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

**24. Infants** ⚭69

A certificate of the Authority under the Youth Correction Authority Act stating that facilities provided for were only for male persons, that a place for examination and study on a limited individual case basis had been established and that the facilities and personnel were sufficient under the limited certification, was not defective as applied to a male offender. St.1941, p. 2525, § 1730.

**25. Infants** ⚭69

The certificate required under the Youth Correction Authority Act is but a general notice that the Authority is ready to begin its work and the provision for it should be liberally construed to carry out the purpose of the Act. St.1941, p. 2525, § 1730.

**26. Infants** ⚭16

The provisions of the Youth Correction Authority Act authorizing juvenile court to commit persons subject to its jurisdiction to the Authority does not contemplate a judgment as a condition to commitment, since proceedings in the juvenile court are not criminal in nature and that court never pronounces judgment of conviction upon such persons. St.1941, § 2527, § 1736.

**27. Infants** ⚭69

Under the Youth Correction Authority Act no commitment to the Authority is to be made, except by the juvenile court, until after judgment, and the commitment then operates to suspend the execution of the judgment. St.1941, pp. 2526, 2527, §§ 1731.-5, 1732, 1739.



**28. Habeas corpus** ⇨22(1)

The term "commit" may be used of a judgment placing a person in custody, but it does not necessarily refer to the original judgment determining the custody, and may mean an ancillary or supplementary order for carrying the original judgment into force.

See Words and Phrases, Permanent Edition, for all other definitions of "Commit".

**29. Habeas corpus** ⇨30(3)

A defendant convicted of a felony in superior court and committed to the Authority under the Youth Correction Authority Act before entry of judgment was entitled to his release from custody of the Authority, since failure to enter judgment before commitment was a matter going to the jurisdiction of the court to the extent that the point could be raised on habeas corpus. St.1941, pp. 2526, 2527, §§ 1731.5, 1732, 1739.

**30. Infants** ⇨69

In proceeding under the Youth Correction Authority Act, the court is exercising a special statutory jurisdiction and cannot proceed unless all the material conditions to its authority specified in the statute have been substantially complied with. St.1941, pp. 2522 to 2533, §§ 1700 to 1783.

**31. Habeas corpus** ⇨109

Where defendant was entitled to his release from custody of the Youth Correction Authority because of failure to enter judgment of conviction in superior court prior to order of commitment, but an application for probation was pending at time of commitment, superior court did not lose jurisdiction to pronounce judgment and defendant would be returned to custody of sheriff. Pen.Code, §§ 1191, 1493; St.1941, pp. 2526, 2527, 2532, §§ 1731.5, 1732, 1739, 1780-82.

On Petition for Rehearing.

**32. Constitutional law** ⇨70(3)

That the Youth Correction Authority Act might be improved by permitting convicted defendant to be committed to the Authority before entering judgment of conviction was no ground for disregarding the plain provisions of the act. St.1941, pp. 2526, 2527, §§ 1731.5, 1732, 1739.

**33. Criminal law** ⇨27

In case of an offense, the punishment prescribed for which might make it either

a felony or a misdemeanor, the charge stands as a "felony" for every purpose up to judgment, and if judgment be felonious, it is a felony after as well as before judgment, but if judgment is for a misdemeanor, it is deemed a "misdemeanor" for all purposes thereafter. St.1941, pp. 2531, 2532, §§ 1770, 1771.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony" and "Misdemeanor".

Proceeding in the matter of the application of Carlos Herrera, John Sandoval, and Bonifacio Loya for a writ of habeas corpus to secure petitioners' release from custody of the Youth Correction Authority.

Proceeding dismissed as to petitioners Sandoval and Loya and petitioner Herrera discharged from custody of the Youth Correction Authority and ordered to be committed to the custody of the sheriff of the County of Los Angeles.

David C. Marcus, of Los Angeles, for petitioners.

Robert W. Kenny, Atty.Gen., and Lewis Drucker and Robert A. Neeb, Jr., Deputy Attys. Gen., for respondent.

SHAW, Justice pro tem.

The petitioners were charged, in two separate informations filed in the Superior Court of Los Angeles County, with the crime of assault with a deadly weapon. Petitioners Sandoval and Loya entered pleas of "guilty of simple assault," a misdemeanor. Petitioner Herrera pleaded "not guilty," and after trial was found guilty of the offense charged. Each of them was committed to the Youth Correction Authority (hereinafter referred to by that name or as "the Authority"), with its consent, the court finding in the commitments that each was under the age of 23 years at the time of his apprehension. Each petitioner seeks by this writ of habeas corpus to obtain his discharge from the custody of the Authority on the ground that the statute purporting to authorize his commitment to it is unconstitutional, for many reasons, and void, and that it has not been complied with in the making of the commitments.

[1,2] As to petitioners Sandoval and Loya it appears from the return to the writ, and is not disputed, that after the

writ was issued but before the return each of them was paroled by the Authority and released from custody. By the terms of this order of parole each was "placed on parole" and "committed to the care and custody of the said Parole Officer for placement, subject to the visitation of the said Parole Officer," and was ordered to report to the Parole Officer as often as required by him. This order is the same in effect as the orders of parole usually made by prison and other such authorities under statutes authorizing parole. In such cases, the courts have uniformly held that the person on parole is not in custody in such sense as to entitle him to a writ of habeas corpus. *Van Meter v. Sanford*, 5 Cir., 1938, 99 F.2d 511; *Ex parte Cindle*, 1941, 71 Okl.Cr.R. 135, 109 P.2d 519; *Ex parte Kirk*, 1919, 16 Okl.Cr.R. 722, 185 P. 706; *Ex parte Davis*, 1915, 11 Okl.Cr.R. 403, 146 P. 1085; *Ex parte Dumas*, 1939, 137 Tex.Cr.R. 524, 132 S.W.2d 883; *Ex parte Cole*, 1883, 14 Tex.App. 579. While this precise question seems not to have been passed on in this state, it has been held that " \* \* \* the writ of habeas corpus does not lie where the petitioner, or person on whose behalf the petition is filed, is not imprisoned, or under actual restraint," and that for this reason one who has given bail on a criminal charge is not entitled to the benefit of the writ. In *re Gilkey*, 1927, 85 Cal.App. 484, 259 P. 766, 767; see note 14 A.L.R. 344, where many cases to the same effect are collected. The principle is the same here. The questions raised by the writ as to Sandoval and Loya have become moot since it was issued, and the petition must be dismissed as to them. In *re Cothran*, 1937, 24 Cal. App.2d 65, 74 P.2d 325.

But petitioner Herrera remains in actual custody; hence we must pass upon the legality of his detention and for that purpose must examine the statute in question. We have come to the conclusion, for reasons hereinafter to be stated, that the statute was not followed in the commitment of petitioner to the Authority, and therefore he must be discharged from its custody and remanded to that of the Sheriff; but since the reasons for this conclusion are not such as to prevent the court from again committing him to the Authority, if the Act is valid, we proceed to consider and express our opinion on the points made against its validity, for the guidance of the court in further proceedings. This statute, known as the "Youth

Correction Authority Act," was passed by the California Legislature in 1941, Stats. 1941, Chap. 937, pp. 2522 to 2533, and adds sections 1700 to 1783, inclusive, constituting Division 2.5, Chapter 1, to the Welfare and Institutions Code. Unless otherwise stated, section numbers hereinafter set forth refer to sections thus added to that code. This statute was originally drafted by the American Law Institute as a model act to be submitted to all the states for adoption. As far as we are informed, it has not, as yet, been adopted in any other state, so no precedents have arisen directly upon it. It has, however, been the subject of much public discussion and some of its provisions have been severely criticised, on constitutional and other grounds. See Vol. IX, No. 4, pp. 579-759, of *Law and Contemporary Problems*, published by Duke University School of Law, which is devoted entirely to discussion of this act and the circumstances giving rise to it. In the course of passage of the California Act through our legislature the model act was altered in some respects, but the general plan and purpose remain the same.

Our act creates a Youth Correction Authority, consisting of three members to be appointed by the Governor, "whose function is to provide and administer preventive and corrective training and treatment for persons committed to it as hereinafter provided." § 1710. No person may be committed to the Authority until it has made a certificate to the Governor of its readiness to act, the precise terms of which will be considered later, § 1730, nor thereafter, until January 1, 1944, without the approval of the Authority. § 1731.5. With such approval, or without it after January 1, 1944, the court in which any person is convicted of a public offense, shall commit such person to the Authority if he is less than 23 years of age at the time of apprehension, is not sentenced to death, imprisonment for life, imprisonment for not more than 90 days or the payment of a fine, and (after January 1, 1944) is not granted probation. §§ 1731.5, 1732.

The Authority, to the extent that funds are available, may "establish and operate a treatment and training service and such other services as are proper for the discharge of its duties; \* \* \* employ and discharge all such persons as may be needed for the proper execution of its duties." § 1752. It may also "make use of law enforcement, detention, probation,

parole, medical, educational, correctional, segregative and other facilities, institutions and agencies, whether public or private, within the State." § 1753. Public institutions and agencies are required to accept and care for persons sent to them by the Authority as if they had been committed by a court of criminal jurisdiction. § 1755. The Authority is also authorized, when necessary and when funds are available, to establish and operate places for detention, examination, study and confinement of persons committed to it, educational institutions, hospitals, and other correctional, segregative or supervisional agencies and facilities for performing its duties. § 1760. It is required to examine and study all persons committed to it and the circumstances of their lives and crimes, and to repeat such examination at least once a year. §§ 1761, 1762.

The Authority has wide discretion in its treatment of a person committed to it. "(a) When a person has been committed to the Authority it may (1) Permit him his liberty under supervision and upon such conditions as it believes conducive to law-abiding conduct; (2) Order his confinement under such conditions as it believes best designed for the protection of the public; (3) Order recommitment or renewed release under supervision as often as conditions indicate to be desirable; (4) Revoke or modify any order except an order of discharge as often as conditions indicate to be desirable; (5) Discharge him from its control when it is satisfied that such discharge is consistent with the protection of the public." § 1766. "As a means of correcting the socially harmful tendencies of a person committed to it, the Authority may (a) Require participation by him in vocational, physical, educational and corrective training and activities; (b) Require such conduct and modes of life as seem best adapted to fit him for return to full liberty without danger to the public welfare; (c) Make use of other methods of treatment conducive to the correction of the person and to the prevention of future public offenses by him." § 1768.

The matter of discharge is also fully covered. "(a) Except as otherwise provided in this chapter, the Authority shall keep under continued study a person in its control and shall retain him, subject to the limitations of this chapter, under supervision and control so long as in its judgment such control is necessary for the pro-

tection of the public. (b) The Authority shall discharge such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public." § 1765. The generality of these provisions is cut down by age and time limits contained in sections 1769, 1770, and 1771, which are hereinafter considered. The provision contained in the model act, by which on application to and order of the court, the Authority could keep a person in its custody for further periods, to which no limit was fixed, was omitted from the California statute. Under our statute the custody of the Authority cannot extend after the person committed has reached the age of 25, even in case of a felony conviction, except during the pendency of a petition for a court hearing under sections 1780-1782 hereinafter considered.

[3] In passing on this statute, we are not concerned with the wisdom or expediency of any of its provisions, such matters being solely of legislative cognizance. *Davis v. County of Los Angeles*, 1938, 12 Cal.2d 412, 420, 84 P.2d 1034; *Bodinson Mfg. Co. v. California, Employment Comm.*, 1941, 17 Cal.2d 321, 325, 109 P.2d 935.

[4-6] Further, we are not required to and should not decide upon the validity of every provision in the act. "If the different parts of the statute are severable and independent of each other, and if the manifest purpose of the legislature can be carried into effect by upholding and enforcing those provisions within its constitutional power, that purpose will not be defeated by the inclusion of an unconstitutional provision subsidiary in its nature." 5 Cal.Jur. 645, 646; *Hale v. McGettigan*, 1896, 114 Cal. 112, 119, 45 P. 1049; *People v. Lewis*, 1939, 13 Cal.2d 280, 284, 89 P.2d 388; *In re Estate of Childs*, 1941, 18 Cal.2d 237, 245, 115 P.2d 432, 136 A.L.R. 333. In addition to this well recognized rule, we have in the statute the provision, now quite common, that "if any article, section, subdivision, sentence, clause, or phrase", is held unconstitutional, such decision shall not affect the validity of the remaining portions of the act, and the declaration that the Legislature would have passed each "phrase" etc., irrespective of the fact that any other part of the act be declared unconstitutional. § 3 of the act amending the Welfare and Institutions Code. While we can hardly give literal



effect to this provision as written, it does make plain the legislative intent, where it might otherwise be in doubt, and thus aids in the application of the rule just stated. *Bacon Service Corp. v. Huss*, 1926, 199 Cal. 21, 34, 35, 248 P. 235. The present case is subject to a particular application of the foregoing rule, stated in 5 Cal.Jur. 644, and approved in *People v. Lewis*, supra [13 Cal.2d 280, 89 P.2d 390], as follows: "\* \* \* the court will not consider the asserted unconstitutionality of portions of an act which do not affect the rights of the party raising the question, in case such portions, if unconstitutional, would fall without affecting the validity of the remainder of the statute."

[7] As in other cases, the statute comes to us with a strong presumption in favor of its validity. The settled rule in this matter is that "all doubts are to be resolved in favor and not against the validity of a statute; that before an act of a coordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, and unquestionable; and in case of a fair and reasonable doubt as to its constitutionality, the statute should be upheld and the doubt resolved in favor of the expressed wishes of the people as given in the statute." *Jersey Maid Milk Products Co. v. Brock*, 1939, 13 Cal.2d 620, 636, 91 P.2d 577, 586. See, also, *Matter of Miller*, 1912, 162 Cal. 687, 696, 124 P. 427, where substantially the same rule is declared.

Petitioners have filed no brief, but the case was orally argued in their behalf and many allegations of invalidity of the statute are made in their petition. From the argument and the petition we gather the points hereinafter mentioned as being those mainly relied on in support of the claim that the statute is invalid. These objections are that the statute is discriminatory, uncertain, ambiguous, indefinite and arbitrary, and that it violates the Fourteenth Amendment, and the like provision of § 13, Art. I of the California Constitution regarding due process of law, the provision of § 11, Art. I of the California Constitution requiring all laws of a general nature to "have a uniform operation," the provision of § 21 of Art. I thereof forbidding the granting to any citizen or class of citizens of "privileges or immunities which, upon the same terms, shall not be granted

to all citizens", the provisions of section 25 of Article IV thereof prohibiting special laws in many cases, the provision of section 1 of Article III thereof dividing the powers of government into three separate departments, legislative, executive and judicial and forbidding any person "charged with the exercise of powers properly belonging to one of these departments" to "exercise any functions appertaining to either of the others" and the provision of § 1 of Art. VI thereof vesting "the judicial power of the State" in the courts therein mentioned. We find none of these objections well taken.

[8-10] One of the principal targets of these attacks is section 1731.5 added by the statute to the Welfare and Institutions Code, which reads as follows: "After certification to the Governor as provided in this article and until January 1, 1944, a court shall commit to the Authority any person convicted of a public offense whom the Authority believes can be materially benefited by the procedure herein provided for, and for whose care and maintenance there exists, in the opinion of the Authority, proper and adequate facilities, and who (a) Is found to be less than 23 years of age at the time of apprehension (b) Is not sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine." The objections to this section made under §§ 11 and 21 of Art. I and § 25 of Art. IV of the California Constitution go to the matter of classification, which is said to be improper, and the point made under the Fourteenth Amendment seems to be in essence the same, though stated in terms of due process of law. Objections to other parts of the statute are based on the same ground, that they make an improper classification, so we pause here to consider the rules applicable to that matter. They were fully considered in *Martin v. Superior Court*, 1924, 194 Cal. 93, 100, 101, 227 P. 762, 765, from which we quote: "It is a settled principle of constitutional law that the Legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. \* \* \*

"The classification, however, must not be arbitrarily made for the more purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for

and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. \* \* \*

"The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason."

*Martin v. Superior Court*, supra, was approved and followed on this point in *County of San Bernardino v. Way*, 1941, 18 Cal.2d 647, 659, 117 P.2d 354, and many other cases might be cited to the same effect.

[11] The question arising on the provision of the Fourteenth Amendment which forbids a state to deny any person the equal protection of the laws is substantially the same as that upon our constitutional provisions above cited. "Equal protection of the laws is not denied by a legislative classification which is not palpably arbitrary and may reasonably be conceived to rest on some real and substantial difference or distinction bearing a just and fair relation to the legislation." 16 C.J.S., Constitutional Law, § 505, p. 998. "Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it.' [Citing cases] 'The rule of equality permits many practical inequalities.'" *New York Rapid Tr. Corp. v. New York*, 1938, 303 U.S. 573, 578, 58 S.Ct. 721, 724, 82 L.Ed. 1024, 1030.

[12] One of the matters to be considered in this connection is "the inherent purpose of the law" and the relation which the classification bears to it. *Martin v. Superior Court*, supra, 194 Cal. 102, 227 P. 766. This statute contains its own state-

ment of its purpose in § 1700: "The purpose of this chapter is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses." A complete reading of the statute convinces us that this is as accurate a statement of its purpose as could be framed in few words. Much has been spoken and written about youthful delinquency, its causes and possible cures, by jurists, criminologists, social workers and others, and no extended discussion of the subject is needed here. The juvenile court acts constitute an attempt at a partial solution of the problem, but they do not completely cover it, our own act being limited to offenders under 21 years of age. §§ 700, 701, Welfare and Institutions Code St.1937, pp. 1030, 1032. Youthful delinquency does not stop at that age.

[13] This act institutes a new mode of dealing with the problem, especially with respect to offenders between the ages of 21 and 23. For the full and proper execution of its purpose and mode of action, as disclosed by the provisions we have already reviewed, a great variety of institutions and agencies will be required. While it is authorized, when funds are available, to establish and operate new institutions and facilities, no funds appear to have been appropriated for that purpose, but the Authority is authorized to make arrangements with existing institutions for use of their facilities. Necessarily a considerable amount of time must be consumed by the Authority in canvassing the situation and making suitable arrangements for the training and treatment of those committed to it. Petitioners' claim is that in such matters the state must deal with all or none of those to whom the purpose of the act applies, but we think that claim is untenable. It must yield to the practical necessities of the situation arising when a new plan of dealing with a subject is adopted and to be put into effect. The legislature may very well have thought that such a new regime could not be put into full operation at once; that it should be allowed for an initial period to feel its way and develop suitable modes of operation before subjecting it to the full impact of the entire case-load which the legislature deemed within the scope of its general purpose. Section 1731.5 appears to be the result of such a legislative conclusion. We cannot

say that either the conclusion or the mode selected for carrying it out, that of leaving to the Authority, in each case, the determination whether its facilities are adequate and the person can be materially benefited, is not reasonable. There is here no improper classification; no forbidden discrimination between those to whom the law is immediately applied and others who may be otherwise dealt with. Such distinctions as are made are based on a sufficient criterion; that is, the adequacy of the available facilities and the probability that the persons affected will be materially benefited thereby, and are well within the category of permissible classification, as above defined.

[14, 15] It appears to be also the contention of petitioner that the provision now under consideration is an improper delegation of legislative power. Such contention cannot be sustained. The statute provides the primary standard to govern the action of the Authority, that is adequacy of facilities and probability of benefit to the person. The delegation of power thus made is within the rule declared in *Fillmore Union H. S. Dist. v. Cobb*, 1935, 5 Cal.2d 26, 33, 53 P. 2d 349, 352, that "authority may be delegated by the Legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or facts upon the board or officer within the scope of the legislative act."

[16] Another attack on the act is directed at the provision that any offender is subject to it (except for the discretion of the Authority until January 1, 1944, which we have already considered) who "is found to be less than 23 years of age at the time of [his] apprehension." §§ 1731.5, 1732. Petitioner calls attention to the fact that the age here fixed differs from that established by section 25 of the Civil Code, 21, as the age below which persons are minors for general purposes, and contends that for this reason the statute is arbitrary and void. The provision fixing the age of those subject to the act appears to constitute its heart, and it may be that any invalidity of that provision would carry the whole act down with it, but we find no such invalidity. The argument is presented as if some special sanctity attached to the age fixed as that at which, for ordinary purposes, persons pass from the status of minors to that of adults. This, of course, is not

true. Even section 25 of the Civil Code recognizes some exceptions to its own rule. The question is simply one of classification and the general rules already stated on that question are applicable here.

[17] We are not without light from the precedents on the application of those rules to this particular subject matter. Thus, in *Gouanillou v. Industrial Acct. Comm.*, 1920, 184 Cal. 418, 421, 193 P. 937, 938, the court said: "It cannot be questioned that the age of majority is a matter of legislative regulation and that the Legislature may prescribe a longer period of minority for some purposes than for others", and upheld a statutory provision making all persons under 21 minors for the purposes of the Workmen's Compensation Act, as applied to a female who, under the provisions of section 25, Civil Code, as it then stood, ceased to be a minor at 18. A question similar to that confronting us arose in *Moore v. Williams*, 1912, 19 Cal.App. 600, 610, 611, 127 P. 509, 513, which involved the provisions of the juvenile court act making all persons under the age of 21 subject to its provisions, at a time when the minority of females for general purposes ended by law at the age of 18. It was objected that as to females this was a special law. The court held that sound reason existed for a classification applying the provisions of the law to female persons until they reached the age of 21, and said that "whether the person is or is not a legally declared minor is beside the question." Substantially the same ruling was made in *Ex parte Willis*, 1916, 30 Cal.App. 188, 157 P. 819.

[18] We have no doubt that adequate reasons exist here for the classification by which the rehabilitative and corrective methods of treatment provided for by this statute are made applicable to all offenders who are less than 23 years of age at the time of their apprehension. Man passes through a period of youth, during which he is more receptive of and compliant with the impressions that come to him from without than in later, more adult years; and because of this characteristic he is, in his period of youth, not only more likely to be led astray into paths of wrongdoing, but also more amenable to the corrective and rehabilitative effect of those means which the Authority is directed to use. The legislature is thus fully warranted in limiting the application of the statute to those who are in this formative period of development. The limit of this period is not sharply marked; not only may it differ with



different persons, but all pass gradually from the one stage to the other. As in all cases where lines must be drawn between zones or classes which gradually merge into each other, the question of the precise location of the line is one for legislative discretion in the first instance, and that discretion is subject to judicial control only when its exercise is so palpably unreasonable and arbitrary that reasonable minds cannot differ as to its character in that respect. See *Martin v. Superior Court*, supra, 194 Cal. 93, 105, 227 P. 762; *Brown v. City of Los Angeles*, 1920, 183 Cal. 783, 789, 192 P. 716; *Reynolds v. Barrett*, 1938, 12 Cal.2d 244, 249, 83 P.2d 29. Here we find nothing on which to base any conclusion that the legislative decision is unreasonable or arbitrary.

Further objections to the act go to its provisions regarding the detention of those who are committed to the Authority, it being argued that such custody may continue for a longer time than that prescribed as the period of imprisonment in punishment of the offenses of which the persons committed have been convicted, that this constitutes an improper discrimination between such persons and others convicted of the same offenses, and that the possible length of the detention by the Authority is so long as to invalidate the act on some other ground not very clearly stated. The act provides that the Authority may either permit a person committed to it to be at liberty under its supervision or order his confinement, § 1766, that it shall keep such person "under supervision and control so long as in its judgment such control is necessary for the protection of the public", and shall discharge him "as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public." § 1765. These provisions, however, do not make possible an unlimited detention because they are limited by other provisions that persons committed to the Authority by a juvenile court, or on conviction of a misdemeanor, shall be discharged on reaching the ages of 21 or 23 respectively or upon the expiration of a two year period of control, whichever is later, §§ 1769, 1770, and that persons convicted of a felony shall be discharged at the age of 25, § 1771, unless the Authority returns such a person to the court for further action and the court commits him to prison, as may be done under sections 1780-1782. If this is done the time during which he is under control of the Authority is deducted from the maximum term of imprisonment

prescribed by law. § 1782. Thus it is possible that a person committed by the juvenile court may be detained by the Authority until he is nearly 23, if committed just before juvenile court authority over him expires at age 21; any other misdemeanor may be detained until the age of 25 or possibly a short time thereafter, if he is apprehended so short a time before reaching the age of 23 that the course of proceedings in court against him does not reach the stage of commitment until he is 23 or past. Felons may in all cases be held by the Authority until the age of 25, but no longer, except to await the court hearing above mentioned.

[19, 20] The petitioner now before this court has been convicted of a felony, and while we see no reason to doubt the validity of these provisions as a whole, it is not necessary to pass upon them except as they affect felons. Felons constitute a class which is separable from the other persons subject to the act, and the validity of the act as it applies to felons would not be affected by possible invalidity of its provisions regarding others. As to felons, we note that, as already stated, if they are eventually sentenced to prison, the time spent under the control of the Authority is deducted from the maximum term, so that such term is not increased by the operation of the act. The length of time for which they may be held does not constitute a discrimination against them, nor does it for any other reason invalidate the act.

In *Ex parte Liddell*, 1892, 93 Cal. 633, 640, 29 P. 251, 253, the court upheld the act of 1889 (Stats. 1889, p. 111) establishing the Whittier Reform School, against an objection similar to the one we are now considering. That act undertook to provide a reform school for juvenile offenders, that is, those between the ages of 10 and 16, and while commitments to the school could be made before conviction, they could also be made after conviction, and the commitment of the particular person there before the court was made after conviction. On this point the court said: "It is true the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the state prison for the same offense would be, but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. [Pen.Code,] Sec-

tion 12. While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself, and those dependent upon him, without the odium which attaches to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the state; and it is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship. The records of the penal institutions of this state show that a large majority of their inmates are young men,—many of them juveniles. The legislature, in its wisdom, has endeavored to provide a place for children manifesting criminal traits, where they can be cared for without being thrown under the baneful influence of veterans in crime. We think the policy of the act a wise one, and we see no constitutional grounds for declaring it invalid." In *Ex parte Nichols*, 1896, 110 Cal. 651, 43 P. 9, 10, the act (Stats. 1889, p. 100) establishing the Preston School of Industry and providing that boys under 18 years of age who were convicted of crimes might be committed to it was in question. One of the objections to its validity was "that it is unequal in its operation, because under it an adult can be punished for petit larceny by imprisonment in the county jail for only six months, while a minor may, for the same offense, be sent to said school for a much longer period." Dealing with this point, the court quoted from *Ex parte Liddell*, *supra*, the same language which we have excerpted therefrom, and followed it.

In *People v. De Fehr*, 1927, 81 Cal.App. 562, 572, 254 P. 588, 592, the court had under consideration the statute relating to commitments of convicted youths to the Preston School of Industry, and declared of such commitments " \* \* \* the purpose is (and such is the obvious purpose of the law authorizing such a course) not to punish the juvenile offender, but to reform and retrieve him by giving him such training and education as will constitute a foundation

that will make him, \* \* \* an upright and useful citizen", and accordingly held that such a commitment was not a judgment, and the court might thereafter revoke it and pronounce judgment upon the conviction.

In *re Daedler*, 1924, 194 Cal. 320, 228 P. 467, dealt with the juvenile court law, discussed it at some length and held that proceedings under it are not penal, but reformatory and educational in character, and hence the law is not invalid because it denies a jury trial to the juveniles upon whom it operates.

[21] In the present case it is clear that the control of the Authority over a person committed to it, and the confinement to which the Authority may subject him, are not to be regarded as punishment at all, but as a means of reformation, correction and rehabilitation. Hence the decisions just reviewed are applicable here, and the fact that control or confinement under the statute may extend over a greater period of time than the possible punishment for the offense of which the person committed to the Authority has been convicted does not show any improper discrimination between him and other persons who have committed the same offense but are not subject to the act and hence may be confined for a lesser time.

[22] Complaint is also made that the power to determine the exact nature of the reformatory treatment to which the person committed shall be subjected, and how long it shall continue, and to decide when he is so far reformed as to be a fit subject for discharge is reposed in the Authority rather than the court and this is claimed to be a delegation of legislative and judicial powers to the Authority and hence in violation of the provisions of the California Constitution above cited requiring a separation of legislative, executive and judicial departments, Art. III, and declaring that the judicial power of the state shall be vested in certain enumerated courts. § 1 of Art. VI.

There is here no improper delegation of legislative power as contended. The legislature has itself created the Authority, fixed its powers and duties, provided what convicted persons shall be committed to it, and established by general rule the standards by which it shall determine what modes of treatment to apply to such persons, and when they shall be released. This is enough to satisfy constitutional requirements on this point. See *Fillmore Union H. S. Dist. v. Cobb*, 1935, 5 Cal.2d 26, 33, 53 P.2d 349, already cited and quoted, and



*People v. Pryor*, 1936, 17 Cal.App.2d 147, 152, 61 P.2d 773, holding that the granting of a discretion as to nature of punishment is not an improper delegation of legislative power.

This statute is quite similar to the indeterminate sentence law, in that it takes from the court any discretion to determine how long a convicted person shall be detained after his commitment and how he shall be treated during such detention. Upholding the indeterminate sentence law, the Supreme Court said in *In re Lee*, 1918, 177 Cal. 690, 693, 171 P. 958, 959: "In answering the claim that the authority vested by the indeterminate sentence law in the board of prison directors is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the indeterminate sentence law. The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character, and properly exercised by an administrative body." This language was quoted with approval in *People v. Sama*, 1922, 189 Cal. 153, 156, 207 P. 893.

[23] It is also contended that the statute does not constitute due process of law because it allows no appeal from the order committing a person to the Authority. Whether such an appeal is possible we need not decide, for "Due process does not comprehend the right of appeal." *District of Columbia v. Clawans*, 1937, 300 U.S. 617, 627, 57 S.Ct. 660, 663, 81 L.Ed. 843, 847.

Other objections made to the validity of this statute have been considered, but we do not deem it necessary to prolong this opinion by discussion of them. We see no reason to doubt the validity of the statute as a whole, and, as already stated, it is not now our duty to consider the validity of its separable provisions.

[24] In addition to the provisions of section 1731.5, already considered, for limited commitments until January 1, 1944, the act provides, in section 1730: "(a) No person may be committed to the Au-

thority until the Authority has certified in writing to the Governor that it has approved or established places of preliminary detention and places for examination and study of persons committed, and has other facilities and personnel sufficient for the proper discharge of its duties and functions.

(b) Before certification to the Governor as provided in subsection (a), a court shall, upon conviction of a person under 23 years of age at the time of his apprehension, deal with him without regard to the provisions of this chapter." The return herein states that the Authority has made the certificate here provided for. Petitioner contends that the certificate made is not sufficient to meet the requirements of section 1730. We find no fatal defect in it. It contains three restrictions not expressly provided for in section 1730: (1) it declares that the facilities provided are only for male persons, (2) it states that the Authority has established a place for examination and study "on a limited individual case basis" and (3) it declares the facilities and personnel sufficient "under this limited certification."

[25] It is clear from the nature and purpose of the functions the Authority is to perform, that it must, to a considerable extent, if not altogether, segregate the sexes and provide separate facilities for them. We find no provision in the act requiring that the Authority be ready to deal with both sexes before it can receive either; and the purpose of the act will be better furthered if it proceeds with each as soon as possible. This it has apparently sought to do by issuing this certificate limited to males and we deem such a certificate a sufficient compliance with the act as to males. Had the word "males" not been inserted in the certificate, the Authority could have brought about the same result during the preliminary period under section 1731.5, by declaring its opinion, when the commitment of a female was proposed, that its facilities were not adequate. There is nothing in the act declaring that but one certificate may be issued, or that the one first issued shall state the readiness of the Authority to receive all persons who are properly subject to commitment. Indeed, the act plainly contemplates that the certificate shall be issued before the Authority has full and complete facilities to care for all persons subject to commitment. The certificate is but a general notice that the Authority is ready to begin its work and the provision for it should be liberally con-



strued to carry out the purpose of the act. § 1700. It may be that the certificate issued is no certificate at all as to females, and that before they can be committed to the Authority, it must issue another certificate including them; but this can readily be done.

The limitation in the certificate to "a limited individual case basis" is but a restatement, in abbreviated form, of the provisions of section 1731.5 already discussed, for a preliminary period of limited commitments, and it is sufficient to authorize commitments under that section. The third limitation is but a reference to the other two and does not affect the validity of the certificate.

[26] Another point made in the petition is that "no sentence or judgment has ever been imposed upon said petitioners by said Superior Court" and that the time therefor has passed. As we understand this point it is that no commitment to the Authority can be made under the act until after formal judgment has been pronounced upon a conviction. In the Herrera case, which remains before us for decision, the petitioner, after being found guilty, made an application for probation, but before it was considered the court, without pronouncing any judgment, ordered "that proceedings herein be suspended" and committed him to the Authority. The direct provisions for commitments to the Authority are contained in sections 1731.5, 1732 and 1732.7 which authorize the commitment of persons "convicted of a public offense" without expressly requiring a judgment as a prerequisite to such commitment, and in section 1736, which authorizes a juvenile court to commit "persons subject to its jurisdiction" to the Authority. Proceedings in the juvenile court are not criminal in nature and hence that court never pronounces judgment of conviction upon such persons, so in this case no judgment is contemplated.

[27] While the term "convicted" is ordinarily satisfied by a plea, verdict or finding of guilty, without a judgment (In re Anderson, 1939, 34 Cal.App.2d 48, 92 P.2d 1020), the connection in which it is used may give it a different meaning, extending it so as to include the existence of a judgment within its import. In re Riccardi, 1920, 182 Cal. 675, 677, 189 P. 694. The context in the statute here under consideration gives it such an extended

signification. Thus, section 1739 provides that "the right of a person who has been convicted of a public offense \* \* \* to an appeal from the judgment of conviction shall not be affected by anything in this chapter", and also that such person may be admitted to bail during the appellate proceedings. There can, of course, be no such appeal unless the judgment has been pronounced. Sections 1731.5 and 1732 provide for commitment to the Authority of persons who are "not sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine." In case of many offenses, punishments which, under this provision, prevent the commitment of a defendant to the Authority are alternative to other punishments which permit such a commitment. For examples see Pen.Code, § 182, conspiracy; § 245, assault with a deadly weapon, the offense here involved; § 221, other assaults; § 264, rape; § 271, abandonment of child; § 473, forgery; § 496, receiving stolen property; Vehicle Code, § 500, negligent homicide by vehicle driver; §§ 500, 501, driving while intoxicated, St. 1935, pp. 173, 174. It is not conceivable that these and other offenses in like case are never to afford cause for commitments to the Authority; but as to them, obviously the nature of the sentence cannot be known and it cannot be determined whether a commitment to the Authority is proper until the judgment has been pronounced. The statute gives no hint that it intends to establish a different procedure in commitments for different crimes. The conclusion is plain that no commitment is to be made, except by the juvenile court, until after judgment, and the commitment then operates to suspend the execution of the judgment.

[28] Section 1782 is not inconsistent with this conclusion. It provides that after the Authority has returned to the court a person whom it can no longer hold under the act, but who in its opinion, should not be released, the court may "discharge the person, admit him to probation or may commit him to the State prison." Here is an express provision for discharge, averting the attribute of finality which would otherwise eventually accrue to an outstanding judgment. Probation, under the Penal Code provisions, § 1203.1, may be granted after judgment and even after appeal from the judgment. *Lloyd v. Superior Court*, 1929, 208 Cal. 622, 283 P. 931. While the

term "commit" may be used of a judgment placing a person in custody, it does not necessarily refer, in all cases, to the original judgment determining the custody. It may mean simply an ancillary or supplementary order for carrying the original judgment into force. Here the court is to inquire into the situation and determine whether the judgment already pronounced is to be carried into effect. If its order is in the affirmative, it thereby "commits" him to prison. Section 1783 is also confirmatory of the proposition that a judgment is to be entered prior to the order of commitment authorized by section 1782, for it expressly provides for an appeal from such order of commitment. No such provision would be necessary if that order were the judgment of conviction, for in that case an appeal would be fully authorized by section 1237 of the Penal Code.

[29, 30] In this case there has been no judgment and the commitment to the Authority is therefore premature. This is a matter that goes to the jurisdiction of the court, to the extent, at least, that the point may be raised on habeas corpus. The court, in proceeding under this act, is exercising a special and limited statutory jurisdiction and cannot proceed unless all the material conditions to its authority specified in the statute have been substantially complied with. *Texas Co. v. Bank of America*, 1935, 5 Cal.2d 35, 39, 40, 52 P.2d 127; *Fortenbury v. Superior Court*, 1940, 16 Cal.2d 405, 408, 106 P.2d 411; *Abelleira v. District Ct. of App.*, 1941, 17 Cal.2d 280, 288, 289, 109 P.2d 942, 132 A.L.R. 715.

[31] This conclusion renders it necessary to discharge the petitioner from the custody of the Authority. However, his conviction still stands and it does not appear, from anything before us, that no further proceedings can be taken upon it. An application for probation was pending when he was committed to the Youth Correction Authority, and until that is disposed of the Superior Court does not lose jurisdiction to pronounce judgment against the defendant. Pen.Code, § 1191. Upon petitioner's conviction he was remanded by the Superior Court to the custody of the sheriff and he should be returned to that custody. Pen. Code, § 1493. That court may, on his return to such custody, proceed further against him, and such proceedings may, if properly carried out, result in his commitment again to the Authority.

This proceeding is dismissed as to petitioners Sandoval and Loya. The petition-

er Herrera is discharged from the custody of the Youth Correction Authority and he is ordered to be committed to the custody of the Sheriff of the county of Los Angeles.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

On Motion for Rehearing.

SHAW, Justice pro tem.

[32] The respondent asks us to grant a rehearing for the purpose of considering further the last point discussed in our opinion, that is, the necessity of pronouncing judgment before committing a convicted defendant to the Youth Correction Authority. We find nothing suggested in the petition which would cause us to change our views on this point. One of the reasons urged for such a change is the greater wisdom, from a social standpoint, of a provision permitting commitment without judgment. But conceding this point, it is one of legislative discretion, to be addressed to the legislature. We cannot give a statute a construction not warranted by its terms, merely because we or others might believe the statute would thereby be improved. Our attention is also called to the fact that probation may be granted without pronouncing judgment and the question is asked: "If no judgment and sentence is contemplated in the mechanics of probation after a conviction, why is it necessary to require judgment and sentence in the mechanics of carrying out this Act which has as its purpose the education and betterment of the person convicted?" Again, the question should be directed to the legislature. The statute governing probation expressly provides that probation may be granted without pronouncing judgment, Pen.Code, § 1203.1, yet with that example before it, the legislature failed to insert any such provision in the statute before us.

The respondent's position appears to be that, if the court could sentence the offender to a punishment which is not one of those mentioned in the statute as preventing his commitment, the offender may be committed to the Authority without imposing sentence. This is a plain departure from the terms of the statute. It provides only for the commitment of a person who "is not sentenced to \* \* \* imprisonment for not more than 90 days" etc., St.1941, p. 2526, § 1731.5 while re-

spondent's construction of it requires the words "is not sentenced" to be changed to read "is not required to be sentenced" or "may be sentenced to a punishment other than." This ignores a form of words which appears to have been carefully chosen for the express purpose of making a rule which can be readily applied to all offenses for which a variable punishment, partly within and partly without the statutory rule, is prescribed by law. The legislature might have provided that all persons convicted of those offenses could be committed to the Authority, or that none of them could be; but it did neither. It chose to establish a rule which required the court first to pass on the gravity of the offense and authorized it then to commit those whose offenses it deemed sufficiently serious to warrant the heavier punishments. Taking the provision for commitments as a whole it embodies an intent to exclude from the ministrations of the Authority those whose offenses are of such serious nature—to be punished by death or life imprisonment—that they are presumably not capable of reformation, and those committing such minor offenses—to be punished by fine or not more than 90 days' imprisonment—that it is deemed unnecessary to burden the Authority with them. We do not find it our duty to frustrate the latter intent by construction.

Respondent's construction of the provision "is not sentenced to" etc. in effect holds it to be satisfied if no sentence has yet been imposed. Literally speaking, one who has not been sentenced at all, that is against whom no judgment has been pronounced, has not been sentenced to death etc., so that, taking the provision in this sense, it would be possible, even in a capital case, to commit the convicted defendant, before judgment, to the Authority. Such construction would entirely ignore the words descriptive of the kinds of punishment which prevent a commitment to the Authority and leave them to hang as mere dead and useless leaves on the statutory tree—a result not to be reached unless no other is reasonably possible.

[33] Another reason why judgment should be pronounced, in case of the offense committed by petitioner, as well as many other offenses with variable punishments, appears from the provisions of sections 1770 and 1771, Welfare and Institutions Code, St.1941, pp. 2531, 2532, which fix different limits for the time a person con-

victed of a felony may be held by the Authority from those established for one convicted of a misdemeanor. It is settled law that in case of an offense, such as that here involved, the punishment prescribed for which might make it either a felony or a misdemeanor, "the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious, in that event, it is a felony after as well as before the judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter." *Doble v. Superior Court*, 1925, 197 Cal. 556, 577, 241 P. 852, 860; 7 Cal.Jur. 871; Pen.Code, § 17. The provisions of sections 1770 and 1771 could be applied in the light of this rule so as to regard the petitioner here as one convicted of a felony, no judgment having yet been pronounced; but such application would not be in accord with the underlying purpose of the statute to discriminate between the more serious crimes and those of lesser gravity.

Furthermore, until the trial court has determined whether petitioner stands guilty of a felony or a misdemeanor the Authority cannot know and cannot determine whether petitioner will be subject to discharge when he reaches the age of 23 or be subject to its jurisdiction and control as a felon until he is 25 and to be returned to court for further proceedings under section 1782.

We find in section 1782 a further necessity for judgment before commitment in case of these offenses whose punishment has a double aspect. If no judgment has been pronounced, one convicted of such an offense is convicted of a felony, under the rule above stated, and may be returned to the court for further proceedings, under sections 1780-1782. When this is done the discretion of the court is limited, by section 1782, to three acts only; it may "discharge the person, admit him to probation or may commit him to the State prison." If this is a provision for judgment, as it must be if no judgment has previously been pronounced, the discretion which the Court has, by the Penal Code, to sentence one in the situation of the petitioner here to a term in jail or to pay a fine has disappeared, without any hint of an intention to destroy it in the title of the Act or in any of its other provisions.

The petition for rehearing is denied.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



22 Cal.2d 138

**SIPPER v. URBAN, Real Estate Com'r.**

**L. A. 18567.**

**Supreme Court of California.**

**May 3, 1943.**

**1. Mandamus ☞7, 154(4)**

Petitioner for writ of mandamus is not entitled to the writ as a matter of right, but its issuance involves consideration of its effect in promoting justice, and burden is upon petitioner to state a *prima facie* case entitling him to relief.

**2. Mandamus ☞87**

Where suspension of real estate broker's license was not shown to have been an abuse of real estate commissioner's discretion, writ of mandamus to annul order of commissioner was properly denied.

**In Bank.**

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in mandamus by Albert Abraham Sipper against Clarence Urban, as Real Estate Commissioner, etc., to annul an order of the Real Estate Commissioner suspending petitioner's license as a real estate broker. From an order denying writ of mandate, petitioner appeals.

**Affirmed.**

For prior opinion, see 128 P.2d 882.

Silverman & Hindin and Maurice J. Hindin, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

**SHENK, Justice.**

The petitioner filed in the superior court his application for the writ of mandamus to compel the respondent real estate commissioner to vacate an order dated September 19, 1941, suspending his license from September 29, 1941, to and including October 9, 1941, or a period of ten days, and to set aside the findings on which the order of suspension was based. The record does not disclose the date of the filing of the original petition for the writ, but it is conceded that it was filed after the period of suspension had expired and the license of the petitioner presumably had been re-instated.

On October 23, 1941, the commissioner issued an order directing the petitioner to

show cause why his license should not be suspended or revoked on the ground that he had engaged in business as a real estate operator during the ten day period in violation of the order of suspension of September 19, 1941. The hearing on the order to show cause was set for November 5, 1941. On January 2, 1942, the petitioner filed an amended petition for the writ wherein he sought the relief prayed for in the original petition and also prayed that the commissioner be directed to dismiss the proceedings commenced by him to further suspend or to revoke the license. By stipulation the hearing set for November 5, 1941, on the order to show cause was continued to a date to be fixed on motion of the commissioner.

In addition to the foregoing the petitioner alleged that the findings and order of the commissioner were not based on any "sufficient, adequate or competent evidence to support" them; that the order was void, and that the commissioner exceeded his authority in making it. It is then alleged that there was filed concurrently with the petition a certified transcript of the proceedings and hearing before the commissioner; that said transcript was referred to and made a part of the petition without prejudice to the petitioner's right to a re-examination of the evidence and the witnesses in court.

The petition together with the record of the proceedings before the commissioner, was presented to the trial court on the application for an alternative writ. The trial court examined the allegations of the petition and the record of the proceedings taken before the commissioner and concluded that the same did not present facts justifying the issuance of an alternative writ and entered an order of denial. The appeal is from that order as an order finally disposing of the controversy in the trial court.

The record of the evidence before the commissioner, which as indicated was submitted as a part of the petition, shows the following:

The petitioner was a licensed real estate broker operating in Los Angeles County. He was cited to appear before the real estate commissioner on August 21, 1941, to answer charges of conduct which, if true, would require the suspension or revocation of his license. After a hearing, findings were made by the commissioner to the effect that the petitioner had sold a parcel

of real property pursuant to the owner's authorization, but for about \$200 more than the authorized price, and had secured that additional amount in a second deed of trust in his own favor, without the knowledge or consent of the owner, and to accomplish his purpose drafted two different sets of instructions to the escrow officer. The commissioner's conclusion was that the petitioner was guilty of conduct which constituted dishonest dealing, and that his license should be suspended for ten days from the effective date of the order, as above stated.

[1,2] On the appeal the petitioner contends that the trial court erred to his prejudice in not according him a hearing on his petition. In this the petitioner may not be sustained. In his application for a writ it was incumbent upon him to state a *prima facie* case entitling him to relief. This would be true on any theory that may be advanced for a court inquiry into the lawfulness of the action of the commissioner. The petitioner is not entitled to the writ as a matter of right, but its issuance involves consideration of its effect in promoting justice (*Wiedwald v. Dodson*, 95 Cal. 450, 30 P. 580; *Betty v. Superior Court*, 18 Cal.2d 619, 116 P.2d 947; *Bartholomae Oil Corp. v. Superior Court*, 18 Cal.2d 726, 117 P.2d 674; 16 Cal.Jur. p. 768 and cases cited), and in turn the trial court may determine that the commissioner has not abused his discretion. *Newport v. Caminetti*, 56 Cal.App.2d 557, 132 P.2d 897. On the allegations of the petition and the record before the commissioner in the present proceeding, it is concluded that no abuse of discretion has anywhere been shown. Indeed, the oral and documentary evidence in the record before the commissioner and before the trial court would not admit of a contrary conclusion.

The order is affirmed.

CURTIS and CARTER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment.

The California Real Estate Act, section 12b, provides that judicial review of decisions of the real estate commissioner shall be by writ of review as defined in Code of Civil Procedure, part III, title I, chapter 1. *Deering's Gen.Laws*, Act 112, vol. I, p. 30. So long as this procedure is

not held unconstitutional the present proceeding in mandamus should be dismissed as unwarranted under the Real Estate Act. In any event, this case cannot be fitted into the new mandamus proceeding to restore a suspended license. The period of suspension had expired when the proceedings were begun, and the petitioner could not therefore pray for a restoration of his license. He originally prayed to have the record of the commissioner expunged. When the second proceeding was undertaken to suspend further or revoke his license because of his alleged disregard of the first suspension, he brought an action in the nature of a bill to enjoin the further proceedings, constrained into the form of a mandamus proceeding, setting forth that the decision of the commissioner in the first proceeding to suspend his license was erroneous on issues of fact. No decision was reached in the second proceeding. The majority opinion assumes that the only issue is the correctness of the commissioner's decision in the first proceeding.

The petitioner demanded the privilege of introducing additional evidence, but the trial court acted exclusively on the record of evidence taken by the commissioner and made the following minute order, "The Court having read and considered the entire record of the evidence introduced and the proceedings had before respondent, finds that there is sufficient competent evidence to sustain the decision and the implied findings of respondent and the order suspending petitioner's license and finds no reason for annulling said order. The petition for writ of mandate is denied." The majority opinion holds that the superior court judge had discretion to deny an alternative writ of mandamus when he found that there was sufficient competent evidence in the record before the commissioner to support his findings and order, and that he thus had discretion to grant a review that has the scope of a certiorari review. The present decision is contrary to that in *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457, where the trial judge was reversed for not admitting new evidence, even though he found sufficient evidence in the administrative record to support the findings and order.

It is clear from the majority opinion that had the review in the present case been by certiorari as required by the Real

Estate Act the result would have been the same—the commissioner's decision would have been sustained on the ground that there was sufficient evidence in his record to sustain his decision. It is therefore unnecessary to dissent from the judgment.

GIBSON, C. J., and EDMONDS, J., concurred.

SCHAUER, Justice.

I concur in the opinion of Mr. Justice SHENK.

This case presents to me, for the first time as a member of this court, the much mooted question as to what should be the policy of the courts of this state (until and unless the people act by express constitutional amendment) with respect to the scope of judicial review of administrative board proceedings. We definitely are not concerned with any problem of policy as to the extent of judicial power which should be given to administrative agencies. The people of the state when they see fit may, and in such instances as those of the Industrial Accident Commission and the Railroad Commission they have seen fit to, delegate substantially full judicial power to such agencies. *We are concerned only with the policy of the scope of judicial review which shall be exercised in respect of state-wide agencies to which such judicial power has not been extended by constitutional amendment.* That our decision has some relevancy to the finality of proceedings before such agencies is but incidental in the determination of our primary problem. The question comes as one of law on opposing contentions, voiced in this case by Mr. Justice SHENK on the one hand and Mr. Justice TRAYNOR on the other, as to whether the procedure known as mandamus or that denominated certiorari is the proper medium for review of such proceedings. A more detailed enunciation of the respective views of the authors of the above-mentioned prevailing and concurring opinions herein is found in *Dare v. Board of Medical Examiners*, (1943) 21 Cal.2d 854, 136 P.2d 304.

The arguments in favor of certiorari and of the principles upon which its applicability would depend also find most able and convincing delineation in the dissenting opinion of Mr. Chief Justice Gibson in *Laisne v. State Bd. of Optometry*, (1942) 19 Cal.2d 831, 848, 123 P.2d 457. Had I

been a member of the court at the time the *Laisne* case was decided, I am impressed with the belief that the accurate historical recitals, the clear logic, and the practical philosophy of the Chief Justice, as expressed in his dissent in that case, would in all probability have led me to concur in the conclusion he advocated, as opposed to the extreme position then taken by the majority. But there are three considerations which now impel me to support, *in effect*, the majority view: (1) The complete trial *de novo* doctrine of the *Laisne* case has been abandoned; (2) The question of whether or not mandamus is a proper remedy is no longer an open one; (3) The question fundamentally is more a matter of state policy than of abstract law, and California is committed to the broader policy.

1. *The complete trial de novo doctrine of the Laisne case has been abandoned.* By the decision in the *Dare* case (*Dare v. Board of Medical Examiners*, supra) the majority of the court has receded from the extreme position taken in the *Laisne* case with respect to the right of a party to a complete trial *de novo* on mandamus review, and has thereby substantially rectified perhaps the most serious of the practical difficulties suggested in the dissenting opinion in the *Laisne* case as bound to be encountered in practice under the majority rule as then stated. The procedure as now declared gives the reviewing court the power and duty of exercising an independent judgment as to both facts and law, but contemplates that the record of the administrative board shall come before the court endowed with a strong presumption in favor of its regularity and propriety in every respect and that the burden shall rest upon the petitioner to affirmatively, competently, and convincingly, support his challenge. In other words, rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts. This is in full accord with the presumption declared in subdivision 15 of section 1963 of the Code of Civil Procedure, "That official duty has been regularly performed." It is, of course, also inherent in the mandamus remedy that the right of the petitioner to the initial issuance of the writ is not absolute. His right to make the application is absolute but the application implicitly calls for the



exercise of judicial discretion, and within the limits of that discretion (for definition of judicial discretion, see *Gossman v. Gossman*, (1942), 52 Cal.App.2d 184, 194, 195, 126 P.2d 178) the writ may be granted or withheld, as the facts averred in and circumstances appertaining to each particular case may require, in the interests of sound justice.

2. *The question of whether or not mandamus is a proper remedy is no longer an open one.* Right or wrong, as abstract legal philosophy, the mandamus method of review has been repeatedly affirmed as the only tenable and available procedure for the review of state board proceedings. See *Standard Oil Co. v. State Board of Equal.*, (1936) 6 Cal.2d 557, 59 P.2d 119; *Whitten v. California State Board, etc.*, (1937) 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; *Drumme v. State Bd. of Funeral Directors*, (1939) 13 Cal.2d 75, 87 P.2d 848; *McDonough v. Goodcell*, (1939) 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; *Laisne v. State Bd. of Optometry*, (1942) *supra*, 19 Cal.2d 831, 123 P.2d 457; *Dare v. Board of Medical Examiners*, (1943) *supra*, 21 Cal.2d 854, 136 P.2d 304; *Russell v. Miller*, (1943) 21 Cal.2d 880, 136 P.2d 318. I do not believe that courts of last resort should lightly skip from side to side of a procedural fence on every change in their personnel. Certainly I do not mean that precedent should be followed to the point of strangulation of progress or perpetuation of harming error, but as to the declaration of judicial procedures in such cases as those under discussion, by which vested constitutional rights of individual persons are to be lost or defended, I am of the opinion that *certainty* of the method may be of greater public importance than its *technical soundness*, where the asserted unsoundness lies not so much in its operation as in its historical or theoretical derivation. In other words, assuming that error has been committed and applying the test stated in *Houghton v. Austin*, (1874) 47 Cal. 646, 667, it seems likely here "that it will produce more of evil than of good to restore the law" to its former status. This conclusion finds implied support in the language of the Chief Justice in his *Laisne* case dissent, where (at page 854 of 19 Cal.2d, at page 470 of 123 P.2d), in discussing the use of mandamus prior to the declaration of the extreme trial de novo theory of the majority in that case, he says, "So long as it was possible, by

use of the writ of mandate, to evolve a proper relationship between the courts and administrative agencies, it did not seem essential to insist upon a return to the historically correct procedure from which the court had strayed." The *Dare* case decision appears to me to substantially re-establish a "proper relationship between the courts and administrative agencies."

3. *The question as to the scope of judicial review of administrative board proceedings is inherently more a matter of state policy than of abstract law, and the State of California is committed to the broader policy.* It is not disputed that the question as to the scope which judicial review of decisions of administrative officers and boards shall take is a matter more essentially and fundamentally of *policy* than of *abstract law*. That there shall be some judicial review of such decisions is implicit in our system of government. Still substantially true and pertinent in fact, if not technically in all respects in law, is the declaration of this court as to administrative board proceedings made in *People ex rel. Whitney v. Board of Delegates of the S. F. Fire Department*, (1860) 14 Cal. 479, 499: "As these were judicial questions, we must regard the Board itself as exercising judicial functions, and as exercising such functions in subordination and subjected to the control and supervision of the Courts, in the manner provided by law. It would be a reproach to the jurisprudence of the State, if the arbitrary, wanton, and illegal, exercise of such powers were beyond the remedial interposition of the Courts."

In view of the extended and able narration and exposition, in the recent cases previously cited, of the history, theory, and development of the law on the subject, a reiteration or attempted extension of such discussions would serve no useful purpose here. It is appropriate, however, to sketch some of the fundamental concepts out of and upon which our policy has developed, and, with a view toward possible ultimate legislative clarification of the procedure, to point out some of the difficulties which have beset this court in its efforts to afford unrelenting protection to the people in their constitutional rights and at the same time to preserve for them to a substantial degree the benefits in efficiency of administration offered by properly functioning and supervised administrative agencies.

In the first place, intellectual integrity requires a frank concession that the procedure known as certiorari (provided for in chapter I of title I of part III of the Code of Civil Procedure) appears from the academic standpoint to be that which traditionally would be appropriate to review of administrative board decisions. But the deduction clearly to be drawn from a perspective view of the whole forest of cases on the subject is that certiorari, strictly limited to its common-law function, does not constitute a vehicle adequate to carry the policy of the people of this State to the goal of the broad judicial review of state-wide administrative board decisions which they desire as a bulwark against arbitrary deprivation of vested property rights. They, by our state Constitution, have divided the powers of government "into three separate departments—the legislative, executive, and judicial" (Calif.Const., art. III, sec. 1) the judicial power being expressly "vested in the Senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county." Calif.Const., art. VI, sec. 1. This is fundamental policy.

Despite this theoretical division of powers the fact remains that each of the three departments is but supplementary to the others, the aggregate making up our scheme of government, and in the carrying on of the complex business of government it is inevitable that each department in exercising the *power* peculiarly vested in it shall make use of certain *functions* which inherently are more characteristic of the *power* of other departments. In this connection both the executive (administrative) and legislative departments necessarily carry on activities in which they receive and weigh evidence, consider the law relative thereto, and come to conclusions thereon.

The basic powers of each department are essentially disparate in character and, in most of their activities, the carrying on of the business of the several departments admits of the incidental use of certain limited *functions* of the others without encroachment upon the basic *powers* of such others, but in administrative board cases (the board functioning in the executive de-

partment of government), where an individual is subjected to a trial and by judgment of the board is to be deprived of a property right, a difficult problem is at once apparent. If the proceedings and decision of the board are given absolute finality as to both fact and law, it is obvious that the full judicial power has been exercised. This unquestionably would be destructive of the basic constitutional concept of division of powers and has not been advocated in entirety by the exponents of the minority view. They do, however, contend that the Legislature has the power under the Constitution to confer upon an administrative board the authority to make a final determination of issues of fact on conflicting evidence, and that in such cases the determinations should be vulnerable to attack on review only if it is shown that the board has acted arbitrarily or capriciously or that the determination is not supported by substantial evidence. In technical consistency, since they espouse certiorari as the remedy, it would seem that they should also contend that errors in law and irregularities in procedure within the jurisdiction of the board are not subject to correction on review. I infer, however, as is pointed out more particularly hereinafter, that they conceive for certiorari a scope which includes the power to correct "serious errors" in law. The majority of the court has insisted that the limited scope of review available under certiorari would be inadequate to serve the interests of justice or protect constitutional rights of individuals. In the *Laisne* case they went to the extreme of holding that only a complete trial *de novo* would suffice to protect such rights. But it is at once apparent that if a substantial amount of finality is not accorded board determinations, substantially all the benefits of the whole administrative board procedure are lost. This fact, pointed out in the *Laisne* dissent, has been recognized by the majority in the *Dare* case.

The difficulty lies (a) in fixing a reasonable and workable boundary and (b) in finding or developing a procedure suited to the problem. Whether the boundary shall be set strictly at the jurisdictional inquiry of certiorari, shall go to the other extreme and encompass a complete trial *de novo*, or shall find a middle ground with strong presumptions in favor of the board determinations, giving them the effect of finality in most cases but with ultimate power

in the courts independently to consider the evidence and the law, is obviously a question of governmental policy.

As previously indicated, I do not understand that the minority freely and unqualifiedly advocates certiorari in its strictly limited common-law scope as the most desirable form of procedure for review of proceedings of the type under discussion. This is indicated in the statement of the Chief Justice in the *Laine* case dissent (19 Cal.2d at page 868, 123 P.2d at page 477) that: "Where there is neither a constitutional nor statutory requirement that a court make the determination of fact or reweigh the evidence upon which the administrative agency acted, the duty of the judicial branch is adequately fulfilled by a review upon certiorari\* *which extends to the questions of law involved*. A review upon the issues of law would, of course, include such questions as whether the agency has regularly pursued the authority vested in it, whether it has acted arbitrarily and whether there is substantial evidence to support its determinations of fact. *Our decisions have recognized that administrative rulings on questions of law cannot be accorded finality*. Such questions may be determined conclusively only by a court exercising constitutional judicial power. [Citation.] Upon issues of fact, however, where there is no constitutional requirement that the facts be judicially determined and no statutory indication that the review was meant to extend to a re-examination of questions of fact, the court should uphold the administrative determination unless it is found that there is no substantial evidence to support the finding." A similar implication that certiorari, in administrative board reviews, should and could accomplish the correction of *errors at law* is found in Mr. Justice Traynor's concurring and dissenting opinion in the *Dare* case. He says (at page 868 of 21 Cal.2d, at page 312 of 136 P.2d): "In an actual certiorari proceeding, the court would be confined to the record of the proceedings before the administrative board, and the board's determination would be quashed *if the record disclosed* that the board had acted outside its jurisdiction, or *had made serious errors of law* in the exercise thereof, or that its decision was not supported by substantial evidence." Thus it seems that to overcome a board determination *approximately the same showing is*

*necessary* whether we proceed under the majority view in the *Dare* case or in compliance with the minority view. For all practical purposes the only substantial difference between the two advocated procedures is that in the one case (the minority plan) the party is confined to the record in making his showing, and in the other (the majority plan) the party in making a legally equivalent showing may go beyond the record.

The solution of the problem as to what shall be the vehicle for review, if it is to go beyond the jurisdictional inquiry, should, I believe, within constitutional limits, preferably be furnished by the Legislature. This, however, brings us perilously close to a constitutional problem, as will be noted later. That the people may in any case by constitutional amendment vest judicial power in a board, as has been done with the Railroad Commission and the Industrial Accident Commission, is, of course, elementary. Our problem is limited to situations where there has been no such express delegation of constitutional authority.

So far as this case is concerned, the pertinent question is whether mandamus or certiorari is the appropriate medium for the assertion of petitioner's claims. It will appear that if the policy of the State requires any more than a jurisdictional review certiorari is not adequate; in other words, if either the extreme liberal procedure of a trial de novo, or the middle ground above defined, is to be employed, mandamus is the only presently available and possibly tenable procedure. Neither certiorari nor mandamus, however, without expressly applicable rules of procedure, appears to constitute an ideal vehicle. Both writs have useful functions in the field of jurisprudence but, archaic in their inceptions, neither was originally designed to furnish a review procedure adequate to the complexities of modern government in its use of administrative agencies.

The code section governing certiorari, Code Civ.Proc., § 1068, provides that "A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, or officer, exercising *judicial functions*, *has exceeded the jurisdiction* of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court,

\* Emphasis within quotations is added.



any plain, speedy, and adequate remedy." In addition to the jurisdictional limitation implicit in the language above quoted, the scope of the inquiry on this writ is limited expressly by section 1074 of the same code: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer." It is, I believe, because of such limitations on the scope of the review permissible under certiorari, coupled with the constitutional limitation (whatever it may be) on the authority which the Legislature may delegate to such boards, that the majority of the court in carrying out what it regarded as the best policy for this State in the scope of the review of administrative board proceedings, has resorted to the procedure of mandamus, which at common law "was employed as a supplemental and extraordinary writ of a remedial character, and was early resorted to from the necessity of establishing a method to be used on occasions where the law had provided no other remedy, and where in justice there ought to be one, upon the principle that no right should be without a remedy" (16 Cal.Jur. 764, sec. 4).

Section 1085 of the Code of Civil Procedure provides that the writ of mandate "may be issued \* \* \* to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

This writ has come to be a sort of residuary legatee for judicial powers and procedures not otherwise specifically disposed of by constitution or statute, but by the very nature of its universality it leaves much to the ingenuity of the courts in administering it and likewise much to the conjecture of administrative boards and officers as to the procedure they may follow under its beneficent but uncertain supervision.

As to the legislative constitutional problem previously mentioned, we may recognize that the Legislature cannot make certiorari applicable to non-judicial boards (Standard Oil Co. v. State Board of Equal., (1936) supra, 6 Cal.2d 557, 59 P.2d

119) and that it cannot add to or subtract from the jurisdiction expressly and exclusively vested in certain of the courts enumerated in section 1 of Article VI of the California Constitution, but this does not preclude it from setting up a form or forms of procedure in the nature of the mandamus review which has been developed. So long as it does not add to or subtract from the courts' constitutional powers, express or inherent, it may prescribe regulations which would constitute a guide for the public, the administrative officers, and the courts. It should not be necessary for this court to have to improvise rules of procedure for review of the decisions of any of the several boards of the State, as is trenching upon in the Dare case, yet the need for such rules is patent. It seems highly probable that many of the seemingly arbitrary practices of such agencies and many of the claims of injustice to individuals would be obviated if there were legislatively established standards and plans of procedure, governing both the initial proceedings and the review thereof, known alike to the courts and boards and known by or available to the public. Not the least of the beneficiaries of such legislation would be the boards and officers themselves, most of whom are striving diligently and conscientiously to serve the public despite the uncertainties of the procedures which they have attempted to follow and to which they have been subjected.

In the first volume of California Reports the difficulties of this court in the use of the writs of certiorari and of mandamus appear to have commenced. It was stated in *People ex rel. Field v. Turner*, (1850) 1 Cal. 152, 156, that "As a general rule, at common law, where error has occurred in proceedings, either civil or criminal, which cannot be reached by a writ of error, the writ of certiorari is a proper remedy to correct such error, unless some other statutory remedy has been given." A similar mistaken view of the function of certiorari was indicated in *People v. Hester*, (1856) 6 Cal. 679, 680. In *People ex rel. Whitney v. Board of Delegates of the S. F. Fire Department*, (1860) supra, 14 Cal. 479, 499, 500, the previously expressed view was characterized as "a very serious mistake in regard to the functions of the writ at common law." It is also of interest to note that in *People ex rel. Mulford v. Turner*, (1850) 1 Cal. 143, 52 Am.Dec. 295,

the writ of mandate was given the function of requiring a district court to *vacate an order of disbarment* and to reinstate a firm of attorneys as members of the bar. In *People ex rel. Field v. Turner*, (1850) *supra*, the writ of mandate was applied for but the writ of *certiorari* was issued, apparently in the view that it was of broader scope, in the premises, than mandate. The court said "In this, it is sought merely to reverse a judgment of the Court. The *mandamus* must, therefore, be refused. \* \* \* We deem it proper to award a writ of *certiorari* \* \* \*." That the difficulties of the court in regard to proper functions of the two writs were not ended by the *Whitney* case is manifest from the cases cited *supra* under the second of my reasons for the conclusion I have reached, as well as from the preceding discussion herein.

The conclusion of this court on the policy of applying the broader scope of *mandamus* to reviews of administrative board proceedings is likewise manifest from the cases last mentioned. That such policy has received wide attention and public discussion beyond the volumes of law reports is apparent from the citations in the concurring and dissenting opinion of Mr. Justice Traynor in *Dare v. Board of Medical Examiners*, (1943) *supra*, 21 Cal. 2d 854, 136 P.2d 304. At the general election in 1942 a proposed constitutional amendment (S.C.A. 8, Proposition No. 16, General Election Ballot, 1942) calling necessarily for an expression of preference on the question of policy as to the scope of judicial review of decisions by administrative officers, was submitted to the people of this State. The general effect of the proposed amendment would have been to limit the scope of judicial review in such cases substantially to that afforded by the statutory limits of *certiorari*. On this proposition, on November 3, 1942, the people voted "Yes": 323,558; "No": 1,103,717. By this overwhelming vote the people expressed their preference for the liberal policy followed by the court as opposed to the narrower one proposed to them. The State of California must therefore be recognized as committed to the broader policy encompassed by the *mandamus* procedure.

The contest between *certiorari* and *mandamus* has not been an idle one. The strong presentation of the minority view

has served a valuable purpose; its object has been substantially attained. The type of review procedure sanctioned by the majority in the *Dare* case appears to be an evolutionary product of the views and efforts of both the majority and minority groups. Such procedure seems to envisage a thoroughly practical and proper relationship between the courts and administrative agencies. As previously suggested, there would be little difference as to results obtained in practical operation whether under the *Dare* case *mandamus* plan or the *certiorari* plan of the minority. We perhaps should recognize that we have in practical effect developed a special procedure for the review of administrative board proceedings. While questions of detail in procedure, as is characteristic in all legal or quasi-legal proceedings, may from time to time recur, particularly in the absence of legislatively enacted rules, the basic policy of the people of this State, as hereinabove depicted, with respect to the scope of the review of administrative board proceedings should, I believe, now be accepted by us and henceforth regarded as settled, until and unless the people, in whom rests the full and final power, ordain otherwise by express constitutional amendment.

As to this particular case, regardless of the right purportedly given petitioner by the provisions of section 12b of the California Real Estate Act, Deering's Gen. Laws, (1937) Act 112, p. 30, at p. 40, to seek a review pursuant to the provisions of Chapter I of Title I of Part III of the Code of Civil Procedure (*certiorari*) and whether or not such type of review could be lawfully ordained by the Legislature (see *Standard Oil Co. v. State Board of Equal.*, (1936) *supra*, 6 Cal.2d 557, 59 P.2d 119), he also had the right (available to all persons) to petition for the remedy of his own choosing (*mandamus*). Whether his petition stated facts entitling him to that remedy was a question of law and of judicial discretion depending on the substance of the facts stated; it was a question which would not be concluded by the mere existence of a possible alternative equitable procedure (see *Sheehan v. Board of Police Comm'rs*, (1920) 47 Cal.App. 29, 36, 190 P. 51; *Great Western Power Co. v. Pillsbury*, (1915) 170 Cal. 180, 182, 183, 149 P. 35). The discretion of the trial court is not shown to have been abused.

22 Cal.2d 198

**ALEXANDER et al. v. STATE PERSONNEL BOARD et al.**

L. A. 18401.

Supreme Court of California.

May 10, 1943.

**1. Mandamus ☞169**  
**Officers ☞72(1)**

Where time within which State Personnel Board could have been petitioned for a rehearing had expired before petition for writ of mandate was filed in superior court, application thereafter made for rehearing was belated and mandamus seeking reinstatement to former position was properly dismissed. Gen.Laws 1937, Act 1404, § 173(c).

**2. Officers ☞103**

Administrative remedies must be exhausted before redress may be had in court and a rehearing is an "administrative remedy" within such rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Remedy".

**3. Officers ☞103**

One aggrieved by the rulings of an administrative board may not complain that he has been deprived of constitutional rights if he has not availed himself of the remedies prescribed for a rectification of such rulings.

**4. Officers ☞103**

The rule that administrative remedies must be exhausted before redress may be had in court is not a matter of judicial discretion, but must be uniformly enforced.

**5. Officers ☞103**

Where act provides for a rehearing, but makes no provision for specific redress in courts and resort to rehearing as a "condition precedent", the rule of exhaustion of "administrative remedies" supplies the omission and makes application for a rehearing essential before resort may be had to courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

**6. Officers ☞103**

Failure to apply for a hearing before resorting to court could not be excused

on mere probability that application would have been denied.

CARTER and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Arthur H. Alexander and another against the State Personnel Board of the State of California and others for a writ of mandate directing the reinstatement of petitioners respectively as Petroleum Production Inspector for the Division of State Lands and Chief of the Division of State Lands, Department of Finance, and payment of back salaries. From a judgment for respondents, the petitioners appeal.

Judgment affirmed.

For prior opinion, see 124 P.2d 338.

Holbrook & Tarr, W. Sumner Holbrook, Jr., and L. R. Tarr, all of Los Angeles, for petitioners.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

SHENK, Justice.

Appeal from a judgment entered on an order sustaining the respondents' demurrer to the fourth amended petition without leave to amend.

The petitioners, Alexander and Sturzenacker, applied to the Superior Court in Los Angeles County for the writ of mandate directing the State Personnel Board and the State Land Commission to reinstate them respectively as Petroleum Production Inspector for the Division of State Lands, and Chief of the Division of State Lands, Department of Finance, from which it was alleged they were wrongfully dismissed, and to pay to them back salary from the date of suspension.

Complaints charging the petitioners with incompetency and misconduct were filed with the State Personnel Board on July 12, 1938. Suspension occurred on August 23, 1938. Hearings were commenced on September 26, 1938. A copy of the board's findings, conclusions and decision dismissing the petitioners was mailed to their counsel on April 8, 1939, and was received two days later. The decision was entered on the roster of state employees on April 11, 1939, and in the minutes of the board



on April 21. The petition for the writ of mandate was filed on July 5, 1939. On September 11, 1939, the petitioners filed with the board a petition for rehearing which was denied.

The petitioners allege that the conduct of the proceedings was irregular; that the members of the board were disqualified by bias, and that by certain utterances one member had prejudged the petitioners' causes.

The trial court sustained the demurrer on the sole ground that the petitioners could not state a cause for relief because application for rehearing by the board had not been made within the time prescribed by the State Civil Service Act and prior to the filing of the petition for relief in the courts.

Section 173(c) of the Civil Service Act (Stats. 1937, p. 2085, Deering's Gen. Laws 1937, Act 1404) provides that within thirty days from and after receipt by him of a copy of the board's decision, the employee or the appointing power may apply for a rehearing.

[1] The time within which the petitioners could have applied for a rehearing expired before the petition for the writ of mandate was filed in the superior court, and the belated application for a rehearing made in September following was ineffective. The petition for the writ of mandate was otherwise filed within the time prescribed by the Civil Service Act.

[2, 3] The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, at pages 292, 293, 302, 109 P.2d 942, 132 A.L.R. 715, and cases cited. The provision for a rehearing is unquestionably such a remedy. As to the general rule, it is stated in *Vandalia Railroad Co. v. Public Service Commission of Indiana*, 242 U.S. 255, at page 261, 37 S.Ct. 93, 61 L.Ed. 276, that one aggrieved by the rulings of an administrative board may not complain that he has been deprived of constitutional rights if he has not availed himself of the remedies prescribed for a rectification of such rulings.

[4-6] The petitioners ask this court to distinguish between a provision in a statute which requires the filing of a petition for rehearing before an administrative board as a condition precedent to commencing proceedings in the courts (see *Carlson v. Railroad Commission*, 216 Cal. 653, 15 P.2d

859; *Albin v. Railroad Commission*, 216 Cal. 655, 15 P.2d 860; *Palermo Land & Water Co. v. Railroad Commission of California*, D.C., 227 F. 708), and a provision such as in the present act which it is claimed is permissive only. The distinction is of no assistance to the petitioners under the rule. If a rehearing is available it is an administrative remedy to which the petitioners must first resort in order to give the board an opportunity to correct any mistakes it may have made. As noted in the *Abelleira* case at page 293 of 17 Cal.2d, 109 P.2d 942, 132 A.L.R. 715, the rule must be enforced uniformly by the courts. Its enforcement is not a matter of judicial discretion. It is true, the Civil Service Act does not expressly require that application for a rehearing be made as a condition precedent to redress in the courts. But neither does the act expressly designate a specific remedy in the courts. So that where, as here, the act provides for a rehearing, but makes no provision for specific redress in the courts and resort to rehearing as a condition precedent, the rule of exhaustion of administrative remedies supplies the omission. The facts here alleged do not bring the case within any possible exception to the enforcement of the rule. Adherence to the rule is not excused in this case because of the bare probability, asserted long after the time had expired, that timely application for rehearing would have been denied. As suggested in *Red River Broadcasting Co. v. Federal Communications Comm.*, 69 App.D.C. 1, 98 F.2d 282, the petitioners cannot be heard to urge that there was danger of refusal of their application when they did not make the effort within the time prescribed.

We conclude that the trial court correctly determined that the petitioners were not entitled to prosecute the present proceeding because they had not first exhausted the available remedies before the State Personnel Board.

The judgment is affirmed.

CURTIS and EDMONDS, JJ., and SPENCE, J., pro tem., concurred.

GIBSON, C. J., did not participate herein.

CARTER, Justice (dissenting).

I dissent. The majority opinion extends the doctrine of exhaustion of administrative remedies far beyond my conception

of what the rule should be in view of the lack of uniformity in the rules of procedure applicable to the various administrative agencies established under the law of this state. It seems to me more consonant with principles applicable to procedure before judicial and quasi-judicial tribunals that unless application for a rehearing is made mandatory by statute or rule, such application need not be made as a condition precedent to a review of the decision or order of such tribunal. Such is the rule with respect to proceedings before judicial tribunals. That is, it is not now necessary to make a motion for a new trial in a trial court before prosecuting an appeal from a judgment of that court; neither is it necessary to petition a District Court of Appeal for a rehearing before petitioning the Supreme Court for a hearing after decision rendered by such District Court of Appeal.

The Legislature has by express statutory provision made mandatory a petition for rehearing before a party dissatisfied with the decision of the Railroad Commission (§§ 66, 67, Act 6386, Gen.Laws) or Industrial Accident Commission (secs. 5900-5910, Labor Code, St.1937, pp. 302-304) may petition the Supreme Court for a review of the decision of either of said commissions. If it were the law that a petition for rehearing were indispensable before such review could be had, the mandatory statutory provisions applicable to the Railroad Commission and Industrial Accident Commission are mere surplusage.

The provision of the State Civil Service Act construed in the majority opinion is subdivision (c) of section 173 and reads as follows:

“(c) Rehearing. Within thirty days from and after receipt by him of a copy of the decision rendered by the board in a proceeding under this section, the employee or the appointing power *may apply* for a rehearing by filing with the board a petition in writing therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as in this act prescribed for the giving of notice of a hearing. Within sixty days after the service of such notice of the filing of the petition for rehearing, the board shall either grant or deny the petition, and if the petition for rehearing is not granted within said period,

it shall be deemed denied. If the petition for a rehearing is granted, the matter shall be set down for hearing by the board, either before the board or before its authorized representative, and such hearing shall be conducted in substantially the same manner and under like rules of procedure as an original hearing upon charges filed under and pursuant to the provisions of this section.” (Emphasis added.)

It should be noted that the statute uses the permissive “may” instead of the mandatory “shall” or “must” in providing that either the employee or the appointing power may petition for a rehearing. It is true that the Civil Service Act does not provide for a judicial review of the decisions of the Personnel Board, but section 52 of the act creates a statute of limitation on actions or proceedings brought to obtain a “legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof.” This section provides that no person seeking a legal remedy under this act shall be compensated for the time subsequent to the date when his action or proceeding arose unless such action or proceeding is filed and served within ninety days after the same arose.

In the case at bar petitioners were suspended from their civil service positions by the State Land Commission, the employing body, on August 2, 1938, pending the hearing on the charges against them before the Personnel Board. The decision of the Personnel Board finding the petitioners guilty of the charges was not mailed to petitioners’ counsel until April 8, 1939. The present action was filed in the Superior Court of Los Angeles County on July 15, 1939. Conceding that petitioners could not have commenced their action to obtain a legal remedy for redress of their alleged wrong or grievance until after receiving notice of the decision of the Personnel Board, it appears from a reading of the provision above quoted pertaining to rehearings that had they been required to petition for a rehearing before commencing their action it would have been possible for at least 120 days to elapse from the date of the decision of the Personnel Board before such action could be commenced. Obviously, their cause of action arose when the Personnel Board rendered its decision sustaining the charges against them, and had they filed a petition for a rehearing and been required to wait 120 days before commencing their action, it is probable that

they would now be met with the contention that their action was commenced too late to enable them to recover compensation for the time subsequent to the date when their cause of action arose.

The obvious purpose of the Legislature in requiring that an action be commenced within ninety days after the cause of action arose to permit the employee to recover compensation for the time subsequent thereto, was to prevent the accumulation of large salary claims for employees who had been illegally suspended or separated from their employment, and to my mind it is highly improbable that it was the intention of the Legislature to require the employee to file a petition for a rehearing with the prospects of not being permitted to commence his action within 120 days after the decision of the Personnel Board. Such interpretation of the statute is to my mind unreasonable and contrary to recognized rules of statutory construction. I could not better state my attitude toward the present statute as applied to this case than in the language of the present Chief Justice of the United States in *United States v. Katz*, 271 U.S. 354, 357, 46 S.Ct. 513, 514, 70 L.Ed. 986, where he said:

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

For the foregoing reasons I am convinced that petitioners were not required to petition for a rehearing before the Personnel Board before commencing their action in the superior court to obtain a review of the decision of said board, and therefore the judgment of dismissal entered on the order of the trial court sustaining a demurrer to their petition without leave to amend on this ground should be reversed.

TRAYNOR, Justice (dissenting).

I dissent. The majority opinion holds that applications for administrative rehearings permitted by statute but not expressly required as a condition precedent to redress in the courts, are in effect required by the rule calling for exhaustion of administrative remedies. At the same time it acknowledges the possibility of exceptions where a rehearing would not constitute an adequate remedy, thus introducing

a perennial question for litigation and judicial determination. Determinations might prove necessary not only for each administrative body in the state but for each new question that arose before it.

Such litigation could be avoided by an unequivocal rule that applications for rehearing permitted by statute are invariably compulsory before resort to the courts. So inflexible a rule, however, would take no account of the endless variations in the administrative bodies throughout the state. They vary in accessibility, formality of procedure, regularity of meetings, personnel, volume of work, the making and keeping of records, and dispatch of business. Situations constantly arise where one or more of these factors would make it impossible for an administrative rehearing to be an adequate remedy. To demand compliance with an administrative determination pending such a hearing might work great hardship, as in the case of suspension of licenses. On the other hand, to postpone compliance until the decision following rehearing might work great harm, as in the case of the continuation of practices inimical to public health and morals.

It is my opinion that there is greater wisdom in the rule that applications for administrative rehearings are not prerequisite to judicial remedies unless so prescribed by statute. *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 48, 43 S.Ct. 466, 67 L.Ed. 853; *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413, 416, 45 S.Ct. 534, 69 L.Ed. 1020; *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 282, 44 S.Ct. 565, 68 L.Ed. 1016; *Columbia Ry., Gas & Elec. Co. v. Blease*, D.C., 42 F.2d 463, 465; *Pender County v. Garysburg Mfg. Co.*, 4 Cir., 50 F.2d 732; *Canadian River Gas Co. v. Terrell*, D.C., 4 F.Supp. 222; see *Birch v. County of Orange*, 186 Cal. 736, 742, 745, 200 P. 647. Under such a rule the Legislature, to which the task appropriately falls, would select the administrative bodies whose functions and procedure insure the fitness of a requirement that applications for rehearing precede resort to the courts. In this wise it has already selected the Railroad Commission (Public Utilities Act, § 66) and the Industrial Accident Commission. Labor Code, § 5901. *Carlson v. Railroad Commission*, 216 Cal. 653, 15 P.2d 859; *Albin v. Railroad Commission*, 216 Cal. 655, 15 P.2d 860; *Palmero Land & Water Co. v. Railroad Commission of California*, D.C., 227 F. 708. There is nothing



in *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, that would preclude the adoption of such a rule. That case was concerned, not with the rehearing question, but with the application of the general rule of exhaustion of remedies to the prosecution of an appeal to a commission from an adjustment unit thereof. The cases applying the exhaustion of remedies rule "where the administrative procedure prescribes a rehearing" (page 302 of 17 Cal.2d, page 954 of 109 P.2d, 132 A.L.R. 715) were invoked merely to dispose of the contention that the rule should not apply on the ground that the commission's earlier decisions in similar cases would render appeal futile.



22 Cal.2d 193

**PEOPLE v. VERTLIEB et al.**  
Cr. 4463.

Supreme Court of California.  
May 3, 1943.

Rehearing Denied June 1, 1943.

**1. Criminal law**  $\Rightarrow$  394

In prosecution for keeping a room with paraphernalia for purpose of recording bets upon horse races, testimony concerning telephone messages heard by officers over telephones in defendants' apartment was admissible under Federal Communications Act. - Communications Act of 1934, § 605, 47 U.S.C.A. § 605; Pen.Code, § 337a.

**2. Gaming**  $\Rightarrow$  98(5)

Evidence that defendants occupied a one-room apartment containing two telephones, that one of defendants said they had been taking bets for about a week, that blank betting markers and racing form had been found in the apartment and filled-in markers on ground below, and that there were a number of calls on telephones during a brief period of time, was sufficient to establish "corpus delicti" of offense of keeping a room with paraphernalia for purpose of recording bets upon horse races. Pen.Code, § 337a.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

**3. Gaming**  $\Rightarrow$  97(2)

In prosecution for keeping a room with paraphernalia for purpose of recording bets upon horse races, scratch sheet used by officer as basis for his testimony as to meaning of numbers on betting markers, though not found in defendants' room where other paraphernalia was obtained, was admissible as a key to a code upon which to base an inference that data on betting markers was part of a system used by bookmakers generally. Pen.Code, § 337a.

**4. Gaming**  $\Rightarrow$  75(1)

If evidence showed that defendants occupied a room with paraphernalia for purpose of recording bets on horse races, conviction was authorized regardless whether contests upon which bets were made were actually held. Pen.Code, § 337a, subd. 2.

**5. Gaming**  $\Rightarrow$  97(2)

In prosecution for keeping a room with paraphernalia for purpose of recording bets upon horse races, racing form found by officers in defendants' room was not rendered inadmissible because form was one sold at news stands and used by public as well as bookmakers. Pen.Code, § 337a, subd. 2.

CARTER and PETERS, JJ., dissenting.  
In Bank.

Appeal from the Superior Court of Los Angeles County; Arthur Crum, Judge.

Jack Vertlieb and another were convicted of offense of bookkeeping, as defined in section 337a of the Penal Code, and they appeal.

Affirmed.

For prior opinion, see 129 P.2d 755.

Morris Lavine, of Los Angeles, for Appellants.

Earl Warren, Attorney General, and Eugene M. Elson, Deputy Attorney General, for Respondent.

EDMONDS, Justice.

Following a trial upon an information charging Jack Vertlieb and Sam Richlin with the crime of bookmaking, as defined in section 337a of the Penal Code, the court found each of them guilty but suspended further proceedings and placed them upon

probation. They have appealed from an order denying them a new trial.

The evidence shows that when two officers entered a room on the second floor of an apartment house in Los Angeles they found Richlin seated in a chair near a table where there were two telephones and some blank betting markers. Vertlieb was in a room nearby. In the presence of the appellants, the manager of the apartment house told the officers that Vertlieb had rented the room; that Richlin had been coming there for a couple of days and staying there all day. The officer testifying to this conversation quoted her as saying "that she didn't know what they were doing in the room, but that they were making a lot of telephone calls, and she was not interested in what went on." Neither of the appellants made any statement at that time, but when asked how long they had been taking bets there and recording them, the answer was "About a week."

Replying to a question asked by one of the officers concerning markers and scratch sheets, Vertlieb stated that he had thrown them out of the window. This officer testified that he found blank markers and a racing form in the room and on the ground some markers with numbers on them.

There were two telephones with different numbers in the room. They were ringing when the officers entered. When answered by one of the officers in the presence of the appellants, a voice said "Here is the winner, 32, 28, 37, 19.60, 8.85, 4.40, 9.40, 4.60, and 4.40." A few minutes later the telephone rang and a voice said, "Jack, who won the seventh race?" The officer replied, "Not in yet." The party on the other end said, "Is this Jack?" The officer replied, "No, it isn't."

Soon the telephone again rang and a voice said, "Sam, 751 won across." On a call shortly after, a voice said, "H. R., is it too late for the eighth?" The officer replied, "No, I will take it." The person on the other end answered, "742, one to win." On another call a voice asked, "Is this Jack?" The officer replied, "No, Sam." The other party said, "Where is Jack?" The officer replied, "Gone home early." The reply was, "O. K. Thanks, Sam."

The other officer answered a telephone call and, as he related the conversation, a voice said, "Who is this?" He replied, "Jack." "It does not sound like Jack to me," was the response. The officer con-

tinued, "Yes, it is I, what do you want?" "No, I don't think it is Jack" came from the instrument as the person calling cut off the connection.

One of the officers, testifying as an expert, said that he was familiar with the paraphernalia used by bookmakers in registering bets. He identified a scratch sheet, not found in the room where the appellants were arrested, as an universally recognized authority listing the entries of horses at particular race tracks throughout the country on the day the markers were found. Comparing the betting markers with this scratch sheet, he could say that the numbers upon them indicated the names of the horses running at various tracks on that day, the amount of the wager and whether bet to win, place or show. The numbers, according to his testimony, also had other meanings relating to wagers on the horses.

[1,2] The appellants contend that the evidence presented by the prosecution is insufficient to establish the corpus delicti. They also challenge the testimony concerning the telephone conversations as inadmissible under the provisions of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605, 47 U.S.C.A. § 605. In support of the convictions, the People insist that the evidence, aside from the messages which were heard by the officers, shows that the appellants were occupying a room for the purpose of recording bets on the result of a horse race, and if the testimony as to what was said over the telephone is inadmissible, it is cumulative evidence only, not justifying a reversal.

The question concerning the use of the telephone messages as evidence has been decided adversely to the appellants. *People v. Kelley*, Cal.Sup., 137 P.2d 1. But even without the testimony of the officer repeating what he heard and said when the telephones were answered, the evidence thoroughly satisfies the requirement concerning proof of the corpus delicti. The record shows evidence that there were two telephones in a one-room apartment rented by Vertlieb for \$5 per week, including the telephones; that Richlin came to the apartment every day and stayed all day; that one of the appellants said they had been taking bets for about a week; that blank betting markers and a racing form had been found in the room and filed-in markers on the ground below; and that there were a

number of calls on the telephones during a brief period of time. From these facts it may reasonably be inferred that the appellants kept a room with paraphernalia for the purpose of recording bets upon horse races. *People v. Kabakoff*, 45 Cal.App.2d 170, 113 P.2d 760; *People v. Manning*, 37 Cal.App.2d 41, 98 P.2d 748.

[3] The appellants complain that the scratch sheet used by the officer as the basis for his testimony as to the meaning of the numbers on the betting markers was not found in the room where the other paraphernalia was obtained. But the foundation for its use was established by testimony that it was used by bookmakers throughout the United States for the purpose of enabling them to place their bets and obtain racing information for that purpose. It was not offered for the purpose of proving that the horses named ran at particular tracks on that day, but only that the numbers on the betting markers corresponded with those shown in it as representing the horses which the publication stated would run at certain tracks. As the asserted key to a code, it was proper evidence upon which to base an inference that the data on the markers were not meaningless numbers but part of a system used by bookmakers generally.

[4, 5] Moreover, the charge was a violation of the statute which makes it unlawful for anyone to keep or occupy: “\* \* \* for any period of time whatsoever, any room \* \* \* of any kind, or any part thereof with \* \* \* paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, \* \* \* upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of \* \* \* or between \* \* \* beasts \* \* \*.” Sec. 337a, subd. 2, Pen.Code. If the evidence shows that the appellants occupied a room with paraphernalia for the purpose of recording bets, it is immaterial whether the contest or contests upon which those bets were made were actually held. The statute proscribes the recording of bets upon any contest or purported contest. *People v. Hinkle*, 64 Cal. App. 375, 221 P. 693. And the fact that the racing form found by the officers in the room is one sold at newsstands and used by the public, as well as bookmakers, does not make it inadmissible as evidence. The trier of fact was entitled to consider its

character and the use to which it might be put in connection with the other evidence in the case.

The order denying a new trial is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent, for the same reasons and upon the same grounds as set forth in my dissenting opinion in the case of *People v. Kelley*, Cal.Sup., 137 P.2d 1.

PETERS, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



22 Cal.2d 191

PEOPLE v. ALLEN.  
Cr. 4448.

Supreme Court of California.

May 3, 1943.

Rehearing Denied June 1, 1943.

#### 1. Gaming ⚡97(2)

In prosecution for keeping place of recording bets on horse races, scratch sheet, used by police officer as basis for his testimony as to meaning of data on betting markers seized in defendant's store, was admissible, though it was not found at defendant's store and was identified as a publication "used by horse players". Pen. Code, § 337a.

#### 2. Gaming ⚡98(5)

Evidence sustained conviction of keeping a place of recording bets on horse races. Pen.Code, § 337a.

In Bank.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Joseph Allen was convicted of keeping place of recording bets on horse races, and he appeals.

Affirmed.

For prior opinion, see 128 P.2d 403.



Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

With the exception of testimony concerning messages received by telephone, the evidence upon which Joseph Allen was convicted of violating section 337a of the Penal Code is substantially the same as that which was presented in the case of *People v. Vertlieb*, Cal.Sup., 137 P.2d 437. And, as in the *Vertlieb* case, the prosecution used a scratch sheet for the purpose of establishing the character of the paraphernalia found in the appellant's place of business.

The appellant and Henry E. Cosgrove were charged in an information having three counts. First it was alleged that they kept and occupied a store with books and papers and paraphernalia for the purpose of recording bets upon horse races. The next count asserted that they received and held money bet upon horse races. The recording of bets upon horse races was the basis of the last count.

Upon a trial, the only witness was a police officer called by the prosecution. He testified that when he entered a cigar store he saw Allen standing behind the counter. Cosgrove, on the outside of the counter and near the cash register, laid down some money. As the witness came by him, Cosgrove grabbed a piece of paper from the counter and tore it in half. At the same time, Allen grabbed several pieces of paper and put them in his pocket. The money, \$2, was left on the counter.

Allen and Cosgrove were placed under arrest. The officer found a scratch sheet of that date and blank pads which had sheets similar in size and shape to the one torn up by Cosgrove. These articles, with certain papers taken from the safe, were received in evidence.

The officer testified that he was familiar with the manner in which bookmaking is customarily conducted in Los Angeles county and that the exhibits include betting markers. The symbols appearing on one of them, he said, indicate that a person identi-

fied by the initials C. J. made a bet on two particular horses, one to win and one to place. The significance of names and numbers on other exhibits was similarly explained. The meaning of the data appearing on the markers was obtained, in part, from a scratch sheet which was not found at the cigar stand but was identified as a publication "used by horseplayers."

At the time of the arrest, testified the officer, the appellant told him that the cigar store was his place of business. Allen said that he had moved in there about two years before; he had never had a key to the safe and the safe had not been opened. Questioned as to how the articles received in evidence got into the safe Allen replied, "A bookmaker leaves this stuff every night." But, the witness continued, Allen said that he did not know the bookmaker's name.

Upon a trial by the court, a jury having been waived, Allen was convicted of the offense charged in count I and acquitted upon the other counts. Cosgrove was acquitted upon all three counts. Following the denial of a motion for a new trial, Allen gave a written notice of appeal which, it is stated in his opening brief, is from the judgment of conviction.

According to the appellant, the "verdict" is contrary to the law and the evidence is insufficient to sustain the judgment. He also asserts that the court erred in the admission of evidence and particularly in the use of the scratch sheet. But from the testimony of the officer and the exhibits placed in evidence, say the People, it may reasonably be inferred that the appellant is guilty of the offense charged in count I of the information.

[1,2] What was said in *People v. Vertlieb*, supra, is applicable to the testimony in the present case. The evidence was admissible and amply justifies the judgment of conviction.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

Rehearing denied: SCHAUER, J., not participating.

22 Cal.2d 111

**PERI et al. v. LOS ANGELES  
JUNCTION RY.**

**L. A. No. 18534.**

**Supreme Court of California.**

**May 3, 1943.**

**1. Appeal and error ⇨994(2), 1003**

The jury is sole judge of witnesses' credibility and weight of evidence, and such matters are not within appellate court's province to determine.

**2. Appeal and error ⇨930(1)**

In reviewing evidence on appeal from judgment on jury's verdict, all conflicts must be resolved in respondent's favor and all legitimate and reasonable inferences indulged to uphold verdict if possible.

**3. Appeal and error ⇨989**

When jury's verdict is attacked on appeal as unsupported by evidence, appellate court can determine only whether there is any substantial evidence supporting jury's conclusion.

**4. Appeal and error ⇨996**

When two or more inferences can be reasonably deduced from facts in evidence, reviewing court is without power to substitute its deductions for those of trial court.

**5. Railroads ⇨350(5)**

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, whether lighted wigwag at crossing was burning and its bell ringing *held* for jury on conflicting evidence.

**6. Trial ⇨139(1)**

Testimony of witness, in position to hear bell or whistle of locomotive at highway crossing, that he heard neither, is sufficient to raise conflict with positive testimony that such warning was given and support jury's implied finding that bell was not rung or whistle sounded.

**7. Railroads ⇨350(32)**

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, whether collision would have been avoided had automobile driver applied brakes after he saw train when 15 feet therefrom while traveling at 15 miles per hour was fact question for jury.

**8. Railroads ⇨303(1), 309**

Generally, railroad operator owes duty to exercise reasonable or ordinary care with respect to persons traveling over public highway crossings, both as to manner of operating trains and maintenance of crossings, and standard of care is that of man of ordinary prudence under circumstances.

**9. Railroads ⇨350(1)**

A railroad operator's negligence is ordinarily fact question for jury in crossing accident cases as in other negligence cases.

**10. Railroads ⇨312(13)**

The conditions respecting ability of traveler on highway to observe train approaching railroad crossing and character of such crossing may be bases for conclusion of trier of facts that railroad operator failed to conform to required standard of care in respect to warnings of train's approach to crossing.

**11. Railroads ⇨316(4)**

While no rate of speed in operating train is negligence per se, in absence of statute or ordinance, railroad company must regulate speed of its trains with proper regard for safety of human life and property, and trains must pass over dangerous crossings at less rate of speed proportionate to danger.

**12. Railroads ⇨350(5, 7, 11)**

Whether rate of speed of railroad train approaching highway crossing was excessive and the necessity, nature, character, and extent of warnings, as by flagmen, flares, lights, and signals, are fact questions for jury.

**13. Railroads ⇨309**

Operators of train must exercise care required of person of ordinary prudence under circumstances while passing over highway crossing as well as in approaching such crossing.

**14. Railroads ⇨350(5, 9)**

Whether operator of slowly moving freight train, struck by automobile at unlighted highway crossing on dark foggy night, was negligent in failing to post flagman at crossing with a light, display lights on train, place flares at crossing, light and operate wigwag signal thereat, or sound bell or whistle of train's Diesel engine, was fact question for jury.

**15. Railroads** Ⓒ309, 350(6)

Where conditions at railroad crossing over highway create unusual hazard or danger, railroad operator must exercise care commensurate with such circumstances, and whether he has done so is fact question for jury.

**16. Railroads** Ⓒ312(13)

Where special conditions create unusual hazards at railroad crossing over highway, some warning to highway travelers of train's approach to or presence at crossing may be required in exercise of ordinary care.

**17. Railroads** Ⓒ348(4)

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing on dark foggy night, evidence of failure to sound locomotive whistle or bell while train was approaching crossing and until time of collision was sufficient to support jury's finding of defendant's negligence.

**18. Railroads** Ⓒ312(15)

The statute requiring that bell or whistle of locomotive approaching highway crossing be sounded only until locomotive has crossed highway prescribes only minimum care required, and railroad company will not be held free from negligence, though it literally complied with safety statutes or rules, if circumstances required it to do more. Civ.Code, § 486.

**19. Negligence** Ⓒ93(1)

Where guests in automobile are not responsible for driving thereof, but driver is in sole control of automobile, his negligence, resulting in collision with train at railroad crossing is not "imputed" to guests.

See Words and Phrases, Permanent Edition, for all other definitions of "Imputed Negligence".

**20. Railroads** Ⓒ337(1)

Where both railroad company and driver of automobile, colliding with train on highway crossing, were negligent, guests in automobile may recover damages from company for injuries sustained by them on theory that injuries were caused by "concurrent negligence" of both company and driver.

See Words and Phrases, Permanent Edition, for all other definitions of "Concurrent Negligence".

**21. Railroads** Ⓒ350(26)

A motorist, looking ahead, leaning over steering wheel, and watching highway while approaching unlighted railroad crossing on dark foggy night at speed of 15 miles per hour before colliding with freight train on crossing, was not, as matter of law, guilty of "contributory negligence" barring recovery of damages from railroad company for injuries to passengers in automobile, in absence of any warning of train's presence on crossing.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

**22. Railroads** Ⓒ350(13)

Ordinarily, it is not negligence, as matter of law, for a motorist to drive at such speed that he cannot stop within range of his vision, but such negligence is fact question.

**23. Railroads** Ⓒ307(6)

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, whether wigwag signal at crossing was defective or defendant was negligent in maintenance thereof was immaterial, in view of evidence of defendant's negligence in failing to give any warning of train's presence on crossing, as by sounding locomotive whistle or bell, after discovering that wigwag was not operating.

**24. Trial** Ⓒ260(3)

Refusal of instruction that plaintiffs could not recover, unless all material allegations of complaint were established by preponderance of evidence, was not error, in view of instructions adequately advising jury as to burden of proof.

**25. Trial** Ⓒ296(3)

In personal injury suit, where defendant proffered instruction that defendant was not required to exercise highest degree of care, but only ordinary care, giving thereof with portion about high degree of care deleted was sufficient, in view of other instructions fairly advising jury of standard of care applicable to defendant.

**26. Trial** Ⓒ267(3)

In personal injury suit, trial court's deletion from defendant's instruction of words, "I instruct you that", before statement that person is presumed to have seen that which is open and obvious to view, and of words, "and I further instruct you



that where there is no physical reason why one cannot see that which is plainly visible, I instruct you that to look in the direction of an object which is plainly visible amounts to seeing such object", was not error, as omitted words were surplusage and added nothing material to remainder of instruction as given.

**27. Trial** ⇨253(4)

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing in city, instruction that fact that defendant was granted right to lay tracks and operate cars across city streets gave it no exclusive right to travel over portion of street covered by its tracks was not erroneous as contrary to rule that, where train occupies crossing before vehicle on highway arrives thereat, the privilege is exclusive, as instruction was general and not concerned with time element.

**28. Appeal and error** ⇨216(2)

A defendant, not requesting supplement to or amplification of incomplete instruction given at plaintiffs' request, cannot complain of such instruction on appeal from judgment on jury's verdict for plaintiffs.

**29. Railroads** ⇨351(8, 17)

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, instruction that jury should consider, on question of defendant's negligence, all evidence respecting weather, visibility, and surrounding circumstances, including all elements, conditions, and factors which should have governed man of ordinary prudence, situated like defendant's employees, as well as automobile driver, at time and place of collision, was not erroneous.

**30. Trial** ⇨253(4)

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, instruction that verdict should be for plaintiffs, if jury found from evidence that both defendant and automobile driver were guilty of negligence which, concurring one with the other, proximately caused accident, was not improper because of failure to set forth elements of concurrent negligence.

**31. Trial** ⇨260(8)

In action for injuries to passengers in automobile colliding with defendant's train on railroad crossing, refusal of instruction that defendant could not be held negligent

because wigwag signal failed to operate, unless defendant had notice of defect therein and failed to make repairs, was not erroneous, in view of instruction that if defendant exercised ordinary care in inspection and maintenance of train indicator, defendant could not be charged with negligence merely because such indicator failed to operate.

**32. Damages** ⇨64

Damages recoverable for a wrong are not diminished because injured party has been wholly or partly indemnified for his loss by insurance effected by him without contribution to procurement thereof by wrongdoer.

**33. Damages** ⇨131(4)

A jury's verdict, awarding \$4,000 damages for brain concussion and severe sacroiliac sprain, incapacitating victim to work at his job, paying \$170 per month, for about six months, and necessitating medical expenses of some \$160, was not excessive.

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In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Sam Peri and others against the Los Angeles Junction Railway, a corporation, for personal injuries sustained in a collision between an automobile in which plaintiffs were passengers and defendant's train at a railroad crossing. From a judgment on a jury's verdict for plaintiffs and an order denying a judgment for defendant notwithstanding the verdict, defendant appeals.

Judgment affirmed.

For prior opinion, see, Cal.App., 128 P.2d 563.

Lyndol L. Young and Forrest F. Murray, both of Los Angeles, for appellant.

Devlin & Devlin & Diepenbrock, of Sacramento, Malcolm Davis and Jonathan C. Gibson, both of Los Angeles, Charles W. Dooling, of San Francisco, and O. O. Collins, of Los Angeles, as amici curiae on behalf of appellant.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for respondent.

CARTER, Justice.

Defendant, Los Angeles Junction Railway Company, a corporation, appeals from a judgment entered on the verdict of a jury

for damages for personal injuries suffered by plaintiffs in a railroad crossing accident.

Defendant operates a railroad in Los Angeles County. Its tracks, extending easterly and westerly, cross at grade Atlantic Boulevard, a four lane surfaced highway, extending northerly and southerly. On the south side of the tracks and the east side of the highway there was located a wigwag signal, the customary post with cross arms warning of the presence of the crossing, and another smaller sign bearing the letters "R. R." About 120 feet south of the tracks there was marked on the surface of the highway in white, partially obliterated, two crosses and the letters "RRRR." East of the highway and along the south side of the tracks, buildings were standing.

The collision occurred on September 20, 1940, at between 2:00 and 3:00 a. m. A heavy fog pervaded the atmosphere in the vicinity which, together with other circumstances, limited the field of visibility to from 5 to 10 feet for dark objects and from 35 to 50 feet for lighted objects. It was dark and there were no street lights or lights of any character burning in the entire vicinity. Defendant's freight train consisting of the engine and 32 box cars was traveling east on its tracks at the crossing at 4 to 6 miles per hour. Plaintiffs were passengers in an automobile driven by Mr. Guida. He was driving his car north on the highway in the lane next to the center line at a speed of 15 miles per hour. The lights of his car were illuminated. He was leaning over the steering wheel peering ahead as he approached the crossing. Guida observed the train on the crossing when about 15 feet therefrom. He swerved to the right and applied his brakes but nevertheless collided with the train. His car struck the fourth boxcar from the engine, resulting in personal injuries to plaintiffs. The train did not stop its forward motion after the collision. Neither the bell nor whistle on the locomotive were sounded. There were no lights on the train except the headlight of the engine, the beam of which was obscured from Guida's view after the engine passed the crossing by the buildings on the south side of the tracks. The wigwag signal was not operating by sounding, lighting, or moving, while Guida was approaching the crossing. There were no flares exhibited, watchman present or any device to warn of the presence of the train moving on the crossing other than

above mentioned. Most of the train crew were in the engine. There was no caboose on the train. One member of the crew was on the rear car and carried a lantern. Guida, the driver of the car was familiar with the crossing and knew he was approaching it at the time in question.

Defendant's chief contention is that as a matter of law it was not negligent and that the sole proximate cause of the accident was the claimed negligence of Guida. Defendant admitted at the trial that plaintiffs were not guilty of contributory negligence and that it was not an issue in the case. It also urges that the more substantial evidence in the case is contrary to the foregoing résumé of the facts, and that the statements of several witnesses should not be believed.

[1-4] Turning first to the last mentioned contention it must be remembered that the jury was the sole judge of the credibility of the witnesses and the weight of the evidence. Those matters are not within the province of an appellate court. It may be trite, but none the less pertinent to refer to the rule stated by this court in *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Upon the issue of visibility and the ability to sense that the train was on the crossing, it is undisputed that the night was dark. Several witnesses testified that the fog was very heavy and that there were no lights burning. Witness McGuire was driving a distance of 30 to 40 feet behind Guida and had been so following him for about 1,000 feet. He could see "Just the faint glare of the red taillight" on Guida's car; the range of visibility was from 5 to 10 feet. An officer who arrived at the scene shortly after the accident testified as follows as to what he observed when the

engine of the train returned: "Q. With reference to visibility, tell us what you observed in that regard? A. Well, at that time where I was standing, which would be about the center of the street, 30 feet, and the engine was about \* \* \* oh, 8 or 10 feet from the property line. I mean by that from what would be the street, all of that, I couldn't see the engine." There were no lights from the other side of the train which outlined it. What may have been the condition in that respect a few minutes after the collision does not compel a contrary conclusion inasmuch as other cars may have arrived. McGuire stated he had not seen or heard the train or seen its headlight while approaching the crossing.

[5] That the wigwag was not operating, that is, its light was not burning nor was its bell ringing, clearly appears from the testimony of McGuire as well as others. He stated that he was familiar with the crossing and was watching for the wigwag. That he did not see it nor hear its bell ringing. After the collision he got out of his car and the train was still passing over the crossing, but the wigwag was not operating. Some of the members of the train crew testified that the wigwag was working and was in good repair but that merely created a conflict in the evidence. *Eastman v. Atchison, T. & S. F. Ry. Co.*, 51 Cal.App.2d 653, 125 P.2d 564. The case is not like *Billig v. Southern Pacific Co.*, 192 Cal. 357, 219 P. 992, where there was no evidence that the driver of the car was watching for the wigwag. If the wigwag had been operating its light could have been seen for a distance of 30 to 40 feet and the bell heard probably a greater distance. Ordinarily no evidence is available to one who claims a wigwag is not operating, other than evidence that within the range of observation or hearing it was not detected although attention was directed toward it. It also may be mentioned that witness Markley who was at the scene of the accident with McGuire after the collision and while the train was still passing over the crossing, testified that the wigwag was not operating. Guida, the driver of the car, stated that he was familiar with the crossing and was watching for the wigwag while approaching the crossing but it was not operating. Any conflicts have been resolved against defendant by the appropriate forum.

[6] In regard to sounding of a whistle or bell by defendant, there is adequate evi-

dence to support the implied finding of the jury that neither was done, at least, after the engine passed the crossing. Several witnesses who were in one of the cars, Guida's or McGuire's, approaching the crossing, heard no bell or whistle. It may be inferred that if one or the other had been sounded they would have heard it. It cannot be said as a matter of law that they were not in a position to hear it. If a witness is in a position to hear the bell or whistle of the locomotive and he testifies he heard neither, such testimony is sufficient to raise a conflict with positive testimony that such warning was given. *Eastman v. Atchison, T. & S. F. Ry. Co.*, supra; *Jones v. Southern Pacific Co.*, 74 Cal. App. 10, 239 P. 429; *Lindsey v. Pacific Electric Ry. Co.*, 111 Cal.App. 482, 296 P. 131; *Lahey v. Southern Pacific Co.*, 16 Cal. App.2d 652, 61 P.2d 461; *Hamilton v. Pacific Electric Ry. Co.*, 12 Cal.2d 598, 86 P.2d 829; *Downing v. Southern Pacific Co.*, 15 Cal.App.2d 246, 59 P.2d 578.

There is no question that no warning of the presence of the train, other than a bell, whistle, or wigwag was given. The unlighted crossarm warnings and the like would be of little effect under the conditions of visibility existing at the time of the accident.

[7] It is asserted that the photograph of Guida's car shows by reason of the front end being crushed in that he did not swerve to the right after seeing the train as appears from the testimony. That is of small significance inasmuch as it is difficult to ascertain the precise nature of the destruction that a collision with a moving train will cause. The testimony was positive and clear that the car did swerve. Reference is made to Guida's testimony that when he applied his brakes he was traveling so fast that he did not think "hardly anything happened. We just hit the box car." It is asserted that if the brakes had been applied the collision would have been avoided inasmuch as he was traveling at 15 miles per hour, and saw the train when he was 15 feet therefrom. That presented a factual question for the jury. Consideration must be given to the time within which he reacted after seeing the train, and the mental confusion that would reasonably exist when suddenly confronted with an object looming in his path a short distance ahead. Guida testified that he applied his brakes. Evidence is referred to which indicates that Guida was traveling at a greater rate of



speed than 15 miles per hour. It consisted chiefly of statements taken by defendant and used in an endeavor to impeach plaintiffs' witnesses. There is ample and substantial evidence that the speed of Guida's car was 15 miles per hour.

In considering the question of whether the jury's finding of negligence on defendant's part may be upset and a determination made that as a matter of law defendant was not negligent, certain principles should be observed.

[8] Generally speaking the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing, both as to the manner of operating the train and the maintenance of the crossing. The standard of care is that of the man of ordinary prudence under the circumstances. *Tousley v. Pacific Electric Ry. Co.*, 166 Cal. 457, 137 P. 31; *Bilton v. Southern Pacific Co.*, 148 Cal. 443, 83 P. 440; *Marchetti v. Southern Pac. Co.*, 204 Cal. 679, 269 P. 529; *Green v. Southern Pacific Co.*, 53 Cal.App. 194, 199 P. 1059; *Lininger v. San Francisco, V. & N. V. R. Co.*, 18 Cal.App. 411, 123 P. 235; *Hinkle v. Southern Pacific Co.*, 12 Cal.2d 691, 87 P.2d 349.

[9] The question of the negligence of the railroad operator is ordinarily one of fact in crossing cases as it is in other negligence cases. *Hinkle v. Southern Pacific Co.*, supra; *Tousley v. Pacific Electric Ry. Co.*, supra; *Bilton v. Southern Pacific Co.*, supra; *Marchetti v. Southern Pac. Co.*, supra; *Green v. Southern Pacific Co.*, supra; *Young v. Pacific Electric Ry. Co.*, 208 Cal. 568, 283 P. 61; *Ellis v. Central California Traction Co.*, 37 Cal.App. 390, 174 P. 407; *Badostain v. Pacific Electric Ry. Co.*, 83 Cal.App. 290, 256 P. 576; *Johnson v. Southern Pac. Co.*, 105 Cal.App. 340, 288 P. 81; *Dow v. Southern Pac. Co.*, 105 Cal.App. 378, 288 P. 89; *Eastman v. Atchison, T. & S. F. Ry. Co.*, supra. Too frequently appellate courts have ignored those fundamental principles when dealing with railroad crossing accidents, and have arbitrarily substituted their conclusions of law as to the care a man of ordinary prudence would exercise under the circumstances presented to the trier of facts. The correct approach is expressed in *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105, 54 S. Ct. 580, 583, 78 L.Ed. 1149, 91 A.L.R. 1049, involving a crossing accident, where con-

tributory negligence is discussed: "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."

[10-12] In the instant case there exist circumstances which have a very significant bearing upon the care that should have been exercised by the defendant, the chief of which was the condition of visibility. The conditions with respect to the ability of a traveler on the highway to observe the train approaching the crossing and the character of the crossing may be a basis for the conclusion of the trier of fact that the defendant failed to conform to the required standard of care in respect to the warnings it must give of the approach of the train to the crossing. The court in *Marchetti v. Southern Pac. Co.*, supra, 204 Cal. 684, 269 P. 531, quotes with approval from *Green v. Southern Pacific Co.*, 53 Cal.App. 194, 199 P. 1059: "\* \* \* that the law imposed 'upon a railroad company the duty to use reasonable care, *corresponding to the circumstances* constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a *question for the jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing*. And, where the facts in evidence prove that usually or frequently there are *obstructions which interfere with the opportunity to see moving trains* while travelers on the highway are approaching a much-traveled crossing, it cannot be held that as a matter of law it is not negligence to run trains there without warning signals other than those usually given by engines and cars.'" (Emphasis added.) And with reference to speed being negligence the particular circumstances.

are important as recognized in *Young v. Pacific Elec. Ry. Co.*, 208 Cal. 568, 572, 283 P. 61, 63: "While it is true that no rate of speed is negligence per se in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under *all conditions* at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. The *character of a crossing*, it has been well reasoned, *affects the duty of the railroad company toward travelers upon the public highway*, and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger. \* \* \* As the *standard of duty shifts with the circumstances developed in the case, the question whether or not a rate of speed is excessive is one of fact for the jury.*" (Emphasis added.) Likewise, it is only reasonable to say that the necessity, nature, character and extent of the warnings such as flagmen, flares, lights and signals, shifts with the circumstances of the particular case, and is a question of fact in each case. See *Cooper v. Southern Pacific Co.*, 43 Cal. App.2d 693, 111 P.2d 689; *Alloggi v. Southern Pacific Co.*, 37 Cal.App. 72, 173 P. 1117; *California Rendering Co. v. Pacific Elec. Ry. Co.*, 205 Cal. 73, 269 P. 922.

[13, 14] While the above-cited cases involved a collision with a train approaching a crossing rather than where one is already occupying the crossing and moving thereon, as in the instant case, there is no sound basis of distinction with reference to the general principles governing the case. True, a railroad company has the right to occupy a crossing while passing over it the same as it has a right to approach a crossing, but that does not mean that it must not exercise the care required of a person of ordinary prudence under the circumstances in either case. See *Norton v. City of Pomona*, 5 Cal.2d 54, 60, 61, 53 P.2d 952. Whether or not defendant was negligent was a question of fact when all the circumstances are considered. The unlighted crossing, the darkness, the fog, and the unlighted train, established a condition under which Guida could not see the train. It was an obstruction across the highway which was not visible to the driver of the car for more than 5 to 10 feet. Defendant as a person of ordinary prudence may be reasonably required to anticipate that a traveler on the highway

might collide with the train unless some warning of its presence is given. No warning of any kind was given by defendant. A light was visible for a distance of 35 to 40 feet, and it is reasonable to conclude that if a flagman had been posted at the crossing with a light, or if lights had been displayed on the train, or if flares had been placed at the crossing, or if the wigwag signal had been lighted and operating, or the bell or whistle had been sounded, the collision could have been avoided. The conditions with respect to visibility being as stated it cannot be said as a matter of law that the presence of the train on the crossing was sufficient warning of danger. It could not be seen, and the jury was justified in finding that defendant as a person of ordinary prudence should have, under the circumstances, anticipated that fact. Nor may it be said the train could be heard inasmuch as there is evidence that it was not heard by those in a position to hear it. There is no substantial difference between a train standing on a crossing and one moving thereon under the circumstances here presented. The driver of the car could not see the train, and it may be inferred that such inability arose from the condition of visibility even though the train was moving; and as also appears he did not hear it. The engine was a Diesel and the train was moving slowly. It was not traveling at a fast speed as was the case in *Smith v. Pacific Elec. Ry. Co.*, 66 Cal.App. 485, 226 P. 626, and *Heitman v. Pacific Electric Ry. Co.*, 10 Cal.App. 397, 102 P. 15.

[15, 16] There are authorities involving trains or railroad cars standing on or moving over crossings in which the circumstances were the same or similar, or like principles were in question, in which the issue of the defendant's negligence has been held to be one of fact for the trier of fact. Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he has done so is a question of fact. See *Harper v. Northwestern Pac. R. Co.*, 34 Cal.App.2d 451, 93 P.2d 821; *Brewer v. Southern Pac. Co.*, 29 Cal.App. 2d 251, 84 P.2d 230; *Southern Pac. Co. v. Haight*, 9 Cir., 126 F.2d 900, certiorari denied, 63 S.Ct. 154, 87 L.Ed. 542; *Bingham v. Powell*, 195 S.C. 238, 11 S.E.2d 275; *Crapse v. Southern Ry. Co.*, 201 S.C. 176, 21 S.E.2d 737; *Prescott v. Hines*, 114 S.C.

262, 103 S.E. 543; *Myers v. Atlantic Coast Line R. Co.*, 172 S.C. 236, 173 S.E. 812; *Richard v. Maine Cent. R. Co.*, 132 Me. 197, 168 A. 811; *Beaumont, Sour Lake & Western R. Co. v. Cluck*, Tex.Civ.App., 95 S.W. 2d 1033; *Gulf, C. & S. F. Ry. Co. v. Picard*, Tex.Civ.App., 147 S.W.2d 303; *Beaumont, S. L. & W. R. Co. v. Richmond*, Tex.Civ.App., 78 S.W.2d 232; *Elliott v. Missouri Pac. R. Co.*, 227 Mo.App. 225, 52 S.W.2d 448; *Carson v. Baldwin*, 346 Mo. 984, 144 S.W.2d 134; *Poehler v. Lonsdale*, 235 Mo.App. 202, 129 S.W.2d 59; *Carson v. Thompson*, Mo.App., 161 S.W.2d 995; *Southern Ry. Co. v. Lowry*, 59 Ga.App. 109, 200 S.E. 553; *Squyres v. Baldwin*, 191 La. 249, 185 So. 14; *Jarvella v. Northern Pac. Ry. Co.*, 101 Mont. 102, 53 P.2d 446; *Los Angeles & Salt Lake R. Co. v. Lytle*, 56 Nev. 192, 47 P.2d 934, 52 P.2d 464; *Schofield v. Northern Pac. Ry. Co.*, 4 Wash.2d 512, 104 P.2d 324. The comment in *Carson v. Baldwin*, supra, 144 S.W.2d 136, is pertinent: "Appellant makes the further contention that the court erred in submitting the case to the jury because there were no special conditions or circumstances peculiar to the crossing which made it so unusually hazardous as to require the maintenance of a watchman or warning light. It is not denied that there was no warning of any kind of the presence of the car except the car itself. Where special conditions create unusual hazards at a crossing some warning to travelers of the approach or presence of a train at the crossing may be required in the exercise of ordinary care. This is so for the reason a train may not be seen in time to prevent a collision because of such peculiar conditions."

Likewise in *Jarvella v. Northern Pac. Ry. Co.*, supra, 53 P.2d 449:

"It is generally held that at an ordinary crossing in a case where, as in this, a train has stopped on the crossing, or is moving slowly over it, it is not negligence on the part of the railway company in failing to blow the whistle or ring the bell \* \* \* or to place warning lights along the train \* \* \* or to provide a flagman to warn the traffic \* \* \*."

"Many cases adhering to the rules stated, supra, concede that cases may arise because of peculiar and unusual facts and circumstances and owing to some peculiar environment rendering the situation usually hazardous which may render a railway company negligent in the blocking of a crossing by a standing or slowly moving train of

cars, as is illustrated by the following cases: *Crosby v. Great Northern Ry. Co.*, [187 Minn. 263, 245 N.W. 31], supra; *Gage v. Boston & M. R. R.* [77 N.H. 289, 90 A. 855, L.R.A.1915A, 363], supra; *Jacobson v. New York, S. & W. R. Co.* [87 N.J.L. 378, 94 A. 577], supra; *Gulf, M. & N. R. Co. v. Holifield* [152 Miss. 674, 120 So. 750], supra; *St. Louis-San Francisco Ry. Co. v. Guthrie* [216 Ala. 613, 114 So. 215, 56 A.L.R. 1110], supra; *Southern Ry. Co. v. Lambert* [230 Ala. 162, 160 So. 262], supra; *Sisson v. Southern Ry. Co.* [62 App.D.C. 356, 68 F.2d 403], supra; *Thompson v. St. Louis Southwestern Ry. Co.*, Tex.Civ.App., 55 S.W.2d 1084; *Ausen v. Minneapolis, St. Paul & S. S. M. Ry. Co.*, 193 Minn. 316, 258 N.W. 511; *Gulf, M. & N. R. Co. v. Kennard*, 164 Miss. 380, 145 So. 110. In fact, the dangerous crossing rule was recognized by this court with reference to crossings in general, in the case of *Norton v. Great Northern Ry. Co.*, 78 Mont. 273, 254 P. 165."

Minnesota apparently adopts the view that the presence of a train on a crossing is sufficient warning in itself, in the absence of an unusual or extrahazardous condition. The view which is more modern in the age of the automobile and more compatible with realities is expressed in the dissenting opinion in *Ausen v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 193 Minn. 316, 258 N.W. 511, 515: "Today it is a matter of common knowledge that automobiles are driven at night on our great, wide, straight highways at speeds which do not allow adequate time or space in which to stop for unusual objects such as freight trains completely obstructing the highway unless some warning of the possible or probable presence thereof is given, especially where, as in the case of such trains, the bodies of the cars are apt to be above the direct beams of the automobile lights which the law requires to be projected below 42 inches at 75 feet from the vehicle. Recognizing this, our counties and state highway department place conspicuous warnings of all variations from the normal road. Drivers of ordinary prudence have grown to rely on the presence of such warnings. Certainly ordinary care does not require an automobile always to be driven in the expectation that a railroad train may suddenly and without warning loom up across the highway. To fail to recognize this fact is to apply horse and buggy law to a motor age, and is a failure to recognize the common experi-



ence of mankind. Statistics disclose that 28 per cent of railroad crossing accidents result from vehicles being driven into the sides of moving or standing trains. A variety of circumstances may be suggested where persons driving with ordinary care might suddenly be confronted with a railroad crossing encumbered by a train. Obviously ordinary care requires some warning of the presence of the crossing upon which long trains may be passing or standing."

[17, 18] As we have seen, no effective warning of any kind was given by defendant of the presence of its train moving on the crossing, and the failure to sound the locomotive whistle or the bell alone was sufficient upon which the finding of negligence may be supported. The Guida car was proceeding at only 15 miles per hour. The engine and three cars had passed the crossing when his car collided with the fourth one. It may well be inferred that the bell or whistle could have been heard by plaintiffs and Guida, if they had been sounded continuously while the train was approaching the crossing and thereafter to the time of the collision. The jury were justified in concluding that if such warning had been given the collision would have been avoided. It is true that section 486 of the Civil Code requires a bell or whistle to be sounded only until the engine has crossed the highway, but the statute is only the minimum of care required, and a railroad company will not be held free from negligence even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more. See *Hinkle v. Southern Pacific Co.*, supra; *Harper v. Northwestern Pac. R. Co.*, supra; *Bush v. Southern Pacific R. Co.*, 106 Cal. App. 101, 289 P. 190; *Southern Pacific Co. v. Haight*, supra.

Cases contrary to the views herein expressed are cited. See cases bearing on the subject collected in 15 A.L.R. 901; 56 A.L.R. 1114; 99 A.L.R. 1454. Many of those cases concede that when unusual conditions prevail at the crossing which render it especially hazardous and dangerous, it is a question of fact as to the warnings required to be given by the operator of the train. Others we do not believe express the correct view of the law and overlook the fundamental principles heretofore announced. Especial reliance is placed upon *Dunlap v. Pacific Electric Ry. Co.*, 12 Cal.App.2d 473, 55 P.2d 894. That case is out of line with

the case of *Harper v. Northwestern Pac. R. Co.*, supra, (see discussion in *Southern Pacific Co. v. Haight*, supra), and it is disapproved. The statement in *Mallett v. Southern Pac. Co.*, 20 Cal.App.2d 500, 508, 68 P.2d 281, 285: "A railroad company will not ordinarily be held liable for negligence merely because a crossing is temporarily blockaded by cars in the nighttime or in a dense fog, without furnishing lights or a watchman to warn travelers on the highway of the danger, provided such conduct is not in conflict with an ordinance or a statute to the contrary \* \* \*," was not necessary to the decision and by the use of the word "ordinarily" clearly leaves the question one to be determined by the circumstances of the case.

[19, 20] It is contended that the sole proximate cause of the accident was the negligence of Guida, the driver of the car in which plaintiffs were passengers. It should first be mentioned that any negligence on Guida's part may not be imputed to plaintiffs thus making them guilty of contributory negligence. Furthermore that defense is not an issue in this case. The negligence of the driver of a car is not imputed to the guest in railroad crossing accidents where the latter was not responsible for the driving of the car and the former was in sole control thereof. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; 22 Cal.Jur. 314. Although the driver may have been negligent a recovery may be sustained against the railroad company for an injury to the guest. He may recover on the theory that his injury was caused by the concurrent negligence of both. *Smellie v. Southern Pacific Co.*, supra; 22 Cal.Jur. 314. If it be assumed in the instant case that the driver of the car was negligent plaintiffs' recovery may nevertheless be sustained. They were passengers or guests in Guida's car. Defendant was negligent as we have seen. We cannot say as a matter of law, contrary to the jury's finding, that its negligence was not the proximate cause of the injury. Conceding that Guida was negligent, the defendant's negligence together with that of Guida operated concurrently down to the time of the collision. The jury was correctly instructed on that subject as follows: "The Court: I advised you under these instructions—I will see if I can find it. If you find from the evidence herein that both the defendant Los Angeles Junction Railway Company and the driver of the automobile in which

plaintiffs, Sam Peri and Jessie Johnson, were riding were each guilty of negligence, which negligence or which said negligence concurring one with the other proximately caused the accident in question, then your verdict should be in favor of the plaintiffs, Sam Peri and Jessie Johnson and against the defendant Los Angeles Junction Railway Company, a corporation. Does that answer your question?"

[21, 22] In any event it cannot be said as a matter of law that Guida was negligent. He was looking ahead, leaning over his steering wheel and watching the highway. His speed, 15 miles per hour, was not necessarily excessive under the circumstances. The jury was justified in determining that defendant as a person of ordinary prudence should reasonably anticipate that with no warnings whatsoever being given a prudent driver might collide with the train. Ordinarily it is not negligence as a matter of law for a motorist to drive at a speed that he cannot stop within the range of his vision; it is a factual question. See *Skaggs v. Willhour*, 210 Cal. 524, 292 P. 649; *Bixby v. Pickwick Stage Co.*, 131 Cal.App. 739, 21 P.2d 972; *Casey v. Gritsch*, 1 Cal.App.2d 206, 36 P.2d 696; *Burgesser v. Bullock's*, 190 Cal. 673, 679, 214 P. 649; *Furuta v. Randall*, 17 Cal.App. 2d 384, 62 P.2d 157; *Sawdey v. Producers' Milk Co.*, 107 Cal.App. 467, 290 P. 684; *Haynes v. Doxie*, 52 Cal.App. 133, 198 P. 39; *Hoffman v. Southern Pacific Co.*, 101 Cal.App. 218, 281 P. 681; 23 Cal.Law Rev. 498. *Ham v. County of Los Angeles*, 46 Cal.App. 148, 189 P. 462, involved the violation of an ordinance. The court there recognized that it is not negligence per se in all cases to drive a car at night at such a speed that it cannot be stopped within the radius of its lights. The other discussion in that case appears to be contrary to the views expressed in the above cited cases, which we believe is the better view, and is therefore disapproved.

[23] It is contended that the defendant had no notice of the failure of the wigwag signal to operate and that there is no evidence that it was defective or that defendant was negligent in maintaining it, citing *Vaca v. Southern Pac. Co.*, 91 Cal. App. 470, 267 P. 346. The crew on the engine testified that the wigwag was working hence they must have observed it. The jury was entitled to disbelieve their testimony, as it did, with reference to the operation of the wigwag, and accept plain-

tiffs' evidence that it was not operating. Thus they could have observed that the wigwag was not operating. Knowing that, warning could have been given of the presence of the train on the crossing. It thus becomes immaterial whether the wigwag was defective or defendant was negligent in its maintenance because the negligence could consist in the failure to give any warning such as sounding the locomotive whistle or bell after discovering that the wigwag was not operating. The jury instruction stating the duty of defendant, as contended for by it, with reference to the maintenance of the wigwag is hereinafter quoted, and following it the jury may have concluded there was no negligence in that respect but nevertheless found negligence in other particulars.

[24] Defendant claims error with respect to the giving of instructions to the jury. It offered an instruction that the mere fact that plaintiffs commenced the action for damages is no indication that they suffered injuries or are entitled to recover; and that unless all the material allegations in plaintiffs' complaint are established by a preponderance of the evidence they cannot recover. The first part of the instruction was given but the latter part refused. However, the court in other instructions adequately advised the jury as to the burden of proof.

[25] Defendant's proffered instruction that defendant was not required to exercise the highest degree of care, and it was required to exercise only ordinary care was given with the portion about high degree of care deleted. The instruction was sufficient. Other instructions fairly advised the jury of the standard of care applicable to defendant. There was no error in giving or refusing to give instructions.

[26] Complaint is made of the deletion from defendant's instruction of the following words appearing in italics: "*I instruct you that a person is presumed to have seen that which is open and obvious to the view. (and I further instruct you that) where a person is required in the exercise of due care to use their sense of sight, it is just as much negligence to look and not to see that which is in plain view as it is not to look at all and I further instruct you that where there is no physical reason why one cannot see that which is plainly visible, I instruct you that to look in the direction of an object which is plain-*

*ly visible, amounts to seeing such object."* The portion omitted, shown by italics above, was surplusage and added nothing material to the instruction as given. No error occurred thereby.

[27, 28] Objection is made to three instructions given at plaintiffs' request. The first reads that: "The streets of a municipality such as the place of accident here involved, are for the use of the traveling public, and the right of the defendant railroad company is only to use it in common with the public. The fact that the defendant, Los Angeles Junction Railway Company has been granted the right to lay tracks and operate cars across the streets, gives it no exclusive right to travel over that portion of a street covered by its tracks." It is claimed that that instruction is contrary to the alleged rule that where a train occupies a crossing before a vehicle on the highway arrives at it, the privilege is exclusive. The instruction is general, and does not concern itself with the time element mentioned. As such it is a correct statement of the law. See *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 P. 942, 66 Am.St.Rep. 39. At most it was an incomplete instruction and defendant did not request any supplement or amplification of the instruction. It cannot now complain. See *American Marine Paint Co. v. Nyno Line, Inc.*, 70 Cal.App. 415, 223 P. 366.

[29] At plaintiffs' request the jury was instructed: "Respecting this general question of negligence you should consider all of the evidence relative to the weather and visibility and surrounding circumstances, including all of the elements, conditions and factors which ought to have governed a man of ordinary prudence, situated like the employees of defendant and as well as the driver of the automobile in which plaintiffs were riding at the time and place in question." We find no error in that instruction. It is in accordance with the views herein expressed with reference to the factors bearing on negligence.

[30] The court instructed the jury that: "If you should find from the evidence herein that both the defendant and \* \* \* the driver of the automobile in which plaintiffs \* \* \* were riding were each guilty of negligence, which said negligence concurring one with the other, proximately caused the accident in question then your verdict should be in favor of plaintiffs \* \* \* and against the defendant. \* \* \*" It will be noted that that in-

struction was substantially similar to the instruction heretofore quoted on concurring negligence which latter instruction was given in response to an inquiry of the jury: "When a jury finds that both are negligent in this case, please advise if they should vote for or against defendant." The word "both" referred to the driver of the car and defendant. Defendant claims the instruction was improper because it did not set forth the elements of concurrent negligence. That instruction fairly stated the law. (See authorities cited supra.) In any event defendant is in no position to complain inasmuch as it did not request a more complete instruction on the subject.

[31] Complaint is made of the refusal to give defendant's requested instruction that defendant could not be held negligent by reason of the failure of the wigwag signal to operate unless it appeared that defendant had notice of the defect and failed to make repairs. Defendant's theory on the subject was adequately covered in the following instruction: "It is claimed by the plaintiffs in this case that the train indicator failed to properly operate and give warning of the approach of the train. Even if you should find from the testimony that the train indicator did not operate at the time the plaintiffs approached the crossing, that would not be sufficient proof to support a charge of negligence in that regard. It is a matter of common knowledge that machinery created by the human mind and hands, sometimes fails to operate or becomes defective by reason of its manner of construction and otherwise. Insofar as the train indicator is concerned, the law is that the railroad company shall exercise ordinary care in inspection and maintenance of said equipment, and if you find they have exercised ordinary care in its inspection and maintenance then they may not be charged with negligence by the mere fact that it failed to operate on the occasion in question. And even though it failed to operate, that did not relieve the driver of the car of his duty to use ordinary care in approaching the crossing."

Refusal to give other instructions requested by defendant is urged as error because they stated the law as announced in *Dunlap v. Pacific Electric Ry. Co.*, supra. As will be recalled that case is disapproved.

[32, 33] Damages in the sum of \$4,000 were awarded to plaintiff Peri. He was unable to work for about six months after



he was injured. He had been receiving \$170 per month making a total of over \$1,000 for the period. While it is true that he received \$2 per day compensation while he was unable to work, that sum may not be deducted from his loss of earnings, because it was received from an insurance company under a policy owned and held by him. "Damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him, and to the procurement of which the wrongdoer did not contribute \* \* \*." *Loggie v. Interstate Transit Co.*, 108 Cal.App. 165, 169, 291 P. 618, 619; see also *Inglewood Park Mausoleum Co. v. Ferguson*, 9 Cal.App.2d 217, 48 P.2d 305. In addition he incurred medical expenses of some \$160. The balance remaining was not excessive when we consider that he suffered a brain concussion, a severe sacroiliac sprain requiring the wearing of a belt, and he was still suffering pain at the time of the trial.

The judgment is affirmed.

GIBSON, C. J., and SHENK and CURTIS, JJ., concurred.

EDMONDS and TRAYNOR, JJ., concurred in the judgment.



22 Cal.2d 154

**SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.**  
L. A. 18581.

Supreme Court of California,  
May 3, 1943.

Rehearing Denied May 27, 1943.

#### 1. Bills and notes ☞6, 32

An instrument is drawn to order of "fictitious payee" if it is not intended that the person named on its face have any interest in it. Civ.Code, § 3090(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Fictitious Payee".

#### 2. Bills and notes ☞6

A check payable to a fictitious payee is not payable to "bearer" unless the fact that the payee is fictitious is known by the person making it so payable. Civ.Code, § 3090(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Bearer".

#### 3. Bills and notes ☞201

A forged indorsement is ordinarily a nullity and it does not pass title to a check. Civ.Code, § 3104.

#### 4. Banks and banking ☞148(2)

A bank may not charge to the account of its depositor a check paid on basis of forged indorsement. Civ.Code, § 3104.

#### 5. Bills and notes ☞6

Where drawer intentionally makes a check payable to a fictitious payee, he knows that it will be indorsed in name of payee by some one bearing another name and he cannot obtain benefit of rule that forged indorsement is ordinarily a nullity and does not pass title to check. Civ.Code, §§ 3090(3), 3104.

#### 6. Bills and notes ☞6

Where drawer intrusts an employee with responsibility of signing his checks, the signer takes the place of the drawer, and his signature creates the check and his knowledge binds the drawer as regards check payable to fictitious payee.

#### 7. Bills and notes ☞201

Where drawer or his signer is victim of fraud of bookkeeper who is charged with examining drawer's accounts and informing drawer of his liabilities, the person buying or paying the check has no right to a release at the expense of the innocent drawer from responsibility of determining authenticity of the indorsement. Civ. Code, §§ 3090(3), 3104.

#### 8. Bills and notes ☞63

Delivery of a negotiable instrument is not essential to its execution. Civ.Code, § 3097.

#### 9. Bills and notes ☞368

A check is complete when received by the person who is to deliver it, and lack of delivery is no defense against holder in due course. Civ.Code, § 3097.

**10. Bills and notes** ⇨6

Ordinarily, signer is person making a completed check payable to fictitious payee regardless of whether another employee is responsible for seeing that it reaches the payee. Civ.Code, § 3097.

**11. Banks and banking** ⇨320

Checks cleared through clearing house are not regarded as "paid" until time has passed under clearing house rules during which drawee bank can return them to forwarding bank.

See Words and Phrases, Permanent Edition, for all other definitions of "Paid".

**12. Banks and banking** ⇨148(3)**Bills and notes** ⇨6

Where it appeared that trust officer of bank prepared checks for signature of signing officer drawn to order of an actual person, but the trust officer indorsed payee's name on checks and deposited them with collecting bank which guaranteed prior indorsements, the checks were not payable to a "fictitious payee" and were not "bearer" paper, and the drawer bank was not "estopped" from denying validity of indorsement because the checks were returned to the department under the trust officer after they had been cleared. Civ.Code, §§ 3090 (3), 3097, 3104.

SHENK and CARTER, JJ., dissenting.

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**In Bank.**

Appeal from Superior Court, Los Angeles County; A. L. Pierovich, Judge Assigned.

Action by the Security-First National Bank of Los Angeles against the Bank of America National Trust & Savings Association to recover on defendant's guaranty of all prior indorsements of checks deposited with it. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 129 P.2d 424.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

TRAYNOR, Justice.

The plaintiff, Security-First National Bank, issues numerous checks drawn on it-

self. It was the sole duty of one of plaintiff's officers, A. M. Hadley, to sign such checks. Each check was presented to him with a debit slip, and if the slip showed that the check was properly authorized and that funds were available in the proper account, he signed the check. Among the employees who prepared debit slips and wrote checks, but who were not authorized to sign checks, was Dee L. Ellis, Jr., head of the accounting division of the trust department. Ellis prepared a number of checks for Hadley's signature, drawn to the order of L. W. Bobbitt, together with debit slips in the usual form on the basis of which Hadley signed the checks. There was such a person as Bobbitt, but he knew nothing of the transaction, and Ellis did not intend that he receive any of the checks. Ellis had become acquainted with one of defendant's employees and had no difficulty in establishing an account with defendant as agent for Bobbitt. He indorsed the name of L. W. Bobbitt on the checks, deposited them in this account, and later withdrew the funds deposited. Defendant presented the checks through the Los Angeles clearing house and in accord with the clearing house rules guaranteed all prior indorsements. When plaintiff received the checks from the clearing house, they were returned to the accounting division of the trust department where they fell into the hands of Ellis, who destroyed them. By manipulation of the outstanding-checks file Ellis was able to conceal the fraud for a time, but it was eventually discovered, and plaintiff brought this suit on defendant's guarantee. Defendant appeals from the judgment for plaintiff.

[1, 2] Defendant invokes section 3090 of the Civil Code (§ 9(3) of the Uniform Negotiable Instruments Act) providing: "The instrument is payable to bearer \* \* \* (3) When it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable \* \* \*." If these checks are payable to a fictitious payee, and are therefore bearer paper, defendant's guarantee of the indorsements imposes no liability. *Union B. & T. Co. v. Security-First Nat. Bank*, 8 Cal.2d 303, 65 P.2d 355. The fact that Bobbitt was an actual person does not prevent his name from being that of a fictitious payee, for it is settled that an instrument is drawn to the order of a fictitious payee if it is not intended that the person named on its face have any in-

terest in it. *Union B. & T. Co. v. Security-First Nat. Bank*, supra. Such a check, however, is not payable to bearer unless the fact that the payee is fictitious is known by "the person making it so payable." Civ. Code, § 3090.

[3-7] This condition limits the extent to which the fictitious payee rule qualifies the usual rules governing the effect of forged indorsements. A forged indorsement is ordinarily a nullity. It does not pass title to a check, Civ.Code, § 3104; *Anglo-California Trust Co. v. French American Bank*, 108 Cal.App. 354, 291 P. 621, and a bank may not charge to the account of its depositor a check paid on the basis of such an indorsement. *Hatton v. Holmes*, 97 Cal. 208, 31 P. 1131; *Atwell v. Mercantile Trust Co.*, 95 Cal.App. 338, 272 P. 799. Where the drawer intentionally makes a check payable to a fictitious payee, he knows that it will be indorsed in the name of the payee by someone bearing another name and he thus cannot obtain the benefit of these rules. Similarly, when he entrusts an employee with the responsibility of signing his checks, the signer takes the place of the drawer. His signature creates the check and his knowledge binds the drawer. When the drawer or his signer is the victim of the fraud of the bookkeeper who is charged with examining the drawer's accounts and informing him of his liabilities, the person buying or paying the check has no right to a release at the expense of the innocent drawer from the responsibility of determining the authenticity of the indorsements. See Brannan's *Negotiable Instruments* (Beutel's Sixth Ed.1938) p. 223, 224.

Hadley, not Ellis, was the signer of plaintiff's checks. Defendant, however, asserts that Hadley acted as a mere automaton, and that Ellis's authorization was in effect an order to him to execute the checks. While Hadley ordinarily signed in reliance on vouchers executed by Ellis, the record shows that he refused on at least one occasion to sign a check authorized by Ellis. In many large businesses, it is necessary for the officer authorized to sign checks to do so in reliance on the vouchers of another employee, although that employee has no authority over him. In this situation, as in the execution of plaintiff's checks, the fraud of the employee preparing the vouchers automatically leads to the unwitting execution by the signer of checks to fictitious payees. Since this severance of the function of investigating disbursements from

that of executing checks creates the only situation in which checks can be commonly executed to a fictitious payee without the knowledge of the person making them so payable (See Note, 74 A.L.R. 822), it is probable that the requirement of knowledge was included in the section to prevent such checks from becoming payable to bearer. Thus, in *Los Angeles Investment Co. v. Home Savings Bank*, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193, one Emory, the manager of the insurance department of a real estate firm, prepared requisitions representing false insurance claims. He was not authorized to sign checks. On the basis of his requisitions another officer signed checks drawn to the order of various persons, and in their names Emory signed and negotiated them. It was held that those checks were not payable to bearer, because the officer signing them was the person making them payable to a fictitious payee, and he had no knowledge that the payee was fictitious. Defendant attempts to distinguish the *Home Savings Bank* case on the theory that the representations of the defrauding employee were there subject to an independent audit, so that they were not the direct cause of the execution of the fictitious payee checks. The opinion, however, attaches no significance to this fact, declaring unequivocally that fictitious payee checks are not payable to bearer unless the signor is aware of the fraud. Throughout the many years since the *Negotiable Instruments Law* was drafted, this interpretation has been adopted almost universally throughout the country. See Brannan's *Negotiable Instruments*, supra, p. 208 et seq., and the long list of cases there cited; 7 Am.Jur. 844; 10 C.J.S., Bills and Notes, § 129, p. 580. Since the same result was commonly reached in this country before the adoption of the *Negotiable Instruments Law* (see Kulp, *The Fictitious Payee*, 18 Mich.L.Rev. 296; Note, 22 A.L.R. 1229) the decision in the *Home Savings Bank* case and similar cases may be supported on the theory that section 9(3) of the *Negotiable Instruments Law* was intended to codify the common law. The question whether it was sound policy to adopt the rule is one for the Legislature to decide.

Defendant relies particularly on *Union Bank & Trust Co. v. Security-First Nat. Bank*, supra, *Goodyear Tire & Rubber Co. v. Wells Fargo Bank*, 1 Cal.App.2d 694, 37 P.2d 483, and *Rancho San Carlos v. Bank of Italy*, 123 Cal.App. 291, 11 P.2d 424. The



Union Bank & Trust Co. case involved the fraud of one Williams, the director and assistant secretary of two corporations that maintained accounts at the Union Bank. He was authorized by his employers to sign checks, on which counter-signatures were also required. He drew and signed checks on his employers' accounts and procured the necessary co-signatures. He presented these checks to the Union Bank, and upon a written requisition on behalf of his employers, drawn and signed by himself, purchased cashier's checks to the order of the payees designated in the requisitions. He later indorsed the checks in the name of the payees and deposited them. It was held that the checks were payable to bearer. The court emphasized the special situation of a bank in issuing cashier's checks, a form of currency for which the bank is paid in advance. It is not concerned with who the payee should be. For this reason the knowledge of the purchaser may determine whether a cashier's check to a fictitious payee is payable to bearer. Williams, as authorized by his employers, purchased and designated the payee of the cashier's checks. The court also emphasized the fact that Williams was authorized to sign his employers' checks. He could therefore have drawn fictitious payee checks against his employers' account that would have been payable to bearer. The court concluded that the same result followed when Williams used this authority to sign personal checks as the means of causing the execution of cashier's checks to fictitious payees.

In the Goodyear Tire & Rubber Co. case one Downs was authorized to sign checks, which, however, were not valid until signed by certain co-signers. Downs drew and signed a number of checks and his co-signers signed on the strength of his signature. He then forged the indorsements of the payees and collected the checks. The court pointed out that Downs knew that the payee was fictitious when he drew and signed these checks, and made it clear that the requirement of co-signers did not restrict the effect of his knowledge. Since the joinder of the co-signers was automatic, the court treated the case as if Downs were the sole signer, and concluded that the checks were payable to bearer. The opinion, however, expressly asserts that if Downs had not been the signer of the checks, his knowledge would not have been controlling.

In *Rancho San Carlos v. Bank of Italy*, supra, an employee was entrusted with signed blank checks and was authorized to fill in the blanks. He completed them in the names of fictitious payees, indorsed the checks in those names and then negotiated them. It was held that they were payable to bearer. The court viewed the authority to complete a signed blank check by filling in the name of the payee and the amount payable as the equivalent of the authority to sign an otherwise complete check.

[8-10] Defendant in the present case contends that Ellis delivered the trust department checks because they were sent to the payees by the accounting division. Delivery of a negotiable instrument, however, is not essential to its execution. A check is complete when received by the person who is to deliver it, and lack of delivery is no defense against a holder in due course. Civ.Code, § 3097. Ordinarily, therefore, the signer remains the person making the completed check payable to a fictitious payee regardless of whether another employee is responsible for seeing that it reaches the payee. *Los Angeles Investment Co. v. Home Savings Bank*, supra; *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N.E. 825, 74 A.L.R. 811; *Seaboard Nat. Bank v. Bank of America*, 193 N.Y. 26, 85 N.E. 829, 22 L.R.A.,N.S., 499; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N.E. 740, 22 L.R.A.,N.S., 250; *City of St. Paul v. Merchants' Nat. Bank*, 151 Minn. 485, 187 N.W. 516, 22 A.L.R. 1221. A contrary conclusion has been arrived at when an employee has discretion to decide when and whether checks shall be delivered. See *Goodyear Tire & Rubber Co. v. Wells Fargo Bank*, supra, and cases there cited. The soundness of these decisions need not be considered, since the claim that Ellis had such authority is based only on conjecture. The evidence shows merely that the checks were returned to the accounting division to be forwarded to the payees.

[11, 12] After the checks were cleared they were returned to the trust department accounting division, which was under the supervision of Ellis, and there examined and balanced against the file of outstanding checks. Defendant concludes from these facts that Ellis was the officer who paid them, and argues that in so paying them Ellis represented that he knew of nothing wrong with the checks or their indorse-

ments, and accepted defendant's guarantee of the indorsements without disclosing that they were forged. Defendant contends that because Ellis performed these acts in the course of his employment, plaintiff is estopped from denying the validity of the indorsements. The checks were not paid merely by the settlement at the clearing house. This settlement is usually tentative only, and the cleared checks are not regarded as paid until the time has passed under the clearing house rules during which the drawee bank can return them to the forwarding bank. *Sneider v. Bank of Italy*, 184 Cal. 595, 194 P. 1021, 12 A.L.R. 993. It is difficult to regard any one employee as paying the checks. If one were to be singled out it would most likely be the employee who has authority to decide whether or not the checks should be returned to the forwarding bank. There is no showing that Ellis had such authority.

The judgment is affirmed.

GIBSON, C. J., and CURTIS and EDMONDS, JJ., concurred.

SHENK, Justice (dissenting).

I dissent. In my opinion the judgment should be reversed for the reasons stated by the District Court of Appeal of the Second Appellate District, Division Three, 129 P.2d 424, in an opinion prepared by Justice Hartley Shaw, acting pro tempore, and concurred in by the then Presiding Justice B. Rey Schauer and Justice Parker Wood. I am satisfied that that opinion correctly interprets the statute and case law of this state as applied to the facts and reaches a conclusion which is consonant with reason and justice. I adopt it as a reflection of my views on the subject. It is as follows:

"There are two defendants in this action, but, since the defendant bank only is before us on this appeal, the word 'defendant' where hereinafter used, refers to it only, unless otherwise indicated. The plaintiff issued certain checks drawn upon itself, which came to the defendant upon forged indorsements. The defendant impressed its clearing house stamp upon these checks, presented them to plaintiff through the clearing house and obtained payment. This stamp included the words, 'all prior endorsements guaranteed,' and plaintiff brings this action to recover on that guaranty. Judgment went for plaintiff and defendant appeals.

"The checks in question were drawn and signed in plaintiff's trust department, and

purported to be made for payments due from trusts held by it, to the order of a person named L. W. Bobbitt. Plaintiff had in its trust department several divisions, including an accounting division, the head of which was the other defendant, Ellis who had no official title. All of these checks were false and fictitious checks, written by Ellis, but not signed by him, he having no authority to sign checks for plaintiff, and none of them represented any actual payment due from plaintiff. After they were signed Ellis obtained possession of them, indorsed the name of L. W. Bobbitt upon them and deposited them in an account he had opened with defendant bank, at one of its Los Angeles branches, in the name of Bobbitt. Ellis then drew the money out of defendant bank, on checks to which he signed Bobbitt's name, and used it himself. In dealing with defendant bank Ellis did not pose as Bobbitt, but as the latter's agent, making all of the signatures except the first indorsement before presenting them to the bank. There was such a person as L. W. Bobbitt known to Ellis, but he did not live in California, had nothing to do with these acts of Ellis, knew nothing of them, had no interest in the checks, was not intended by Ellis to have either the checks or the money procured on them, and did not in fact receive either.

"The mode in which Ellis accomplished this defalcation is described in much detail in the record, but a brief statement of it here will suffice. In its trust department plaintiff had an assistant trust officer named Hadley, who was also an assistant secretary. He was referred to as a 'signing officer' and his sole function was to sign checks and other papers and documents coming from the trust department. He signed from 800 to 1500 of these various papers a day, and of course had no time to investigate the various transactions out of which they arose, to see if they were proper, and was not expected to do so, but acted on the assurances of others authorized to give them. When his signature on a check was desired, the check, fully made out, was presented to him, together with a 'debit ticket,' which showed the name of the payee, the purpose for which the check was drawn, its amount and the number of the trust involved. At the bottom of it were also separate spaces headed respectively by the words 'Prepared by,' 'Authorized by,' 'Signed by,' and 'Funds O. K.' In these spaces initials or names of certain author-

ized persons were written by them. When a check and one of these tickets was presented to Hadley his custom, as he testified to it, was to look first to see if one of the authorized persons, of whom he had a list, had signed under 'Authorized by' and then 'to see if the "Funds O. K." was initialed by a person having authority to so initial it; and then I examined the amount set forth in the ticket, and turned it over and examined on the check to see if it was protectographed in that amount; and then I initialed it under "Signed by" and signed the check.' He did not look to see who the payee of the check was or what was the purpose of the payment or the name, purpose or number of the trust. It was physically impossible for him to do that work and the bank did not expect him to do so. Hadley naturally had no recollection of the checks involved here, but Ellis testified that he presented them to Hadley and that in signing them Hadley followed his custom as just stated. Ellis was one of the persons authorized to sign debit tickets in the places looked at by Hadley. Ellis personally wrote the checks in question and the debit tickets for them, initialed the latter and presented the checks to Hadley.

"It is defendant's contention that under the circumstances above stated, the checks in question were payable to bearer, within the intent of section 3090 of the Civil Code. If this be so the checks could be negotiated by mere delivery, no indorsement being necessary for that purpose. Civ.Code, § 3111. Defendant's further contention that in such case defendant would incur no liability on its guaranty of indorsements appears to be conceded, and is correct. *Union B. & T. Co. v. Security-First Nat. Bank*, 1937, 8 Cal.2d 303, 310, 65 P.2d 355.

"Section 3090 of the Civil Code, so far as material here, reads as follows: 'The instrument is payable to bearer—\* \* \*

(3) When it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable \* \* \*.' There is no doubt that, if Ellis' knowledge and intent are regarded as determinative, all the checks in question were payable to the order of a fictitious person, and this also, plaintiff concedes. While there was such a person as Bobbitt, Ellis did not intend that he should have any interest in the checks and he had in fact no rights in them. This is sufficient to make him a fictitious payee, if Ellis was the person making the checks so payable,

within the meaning of section 3090. *Union B. & T. Co. v. Security-First Nat. Bank*, supra, 1937, 8 Cal.2d 303, 307, 65 P.2d 355. Of course, the character of the payee in this respect was known to Ellis, but it was not known to Hadley, who believed all checks signed by him to be regular and genuine in all respects and had no information to the contrary, nor was it known to any person connected with plaintiff, other than Ellis. The question for decision on section 3090 therefore resolves itself into these two questions: Was Ellis the person making these checks 'so payable,' or if not, was his knowledge on the subject chargeable to plaintiff?

"It is now settled that 'the person making it so payable,' within the meaning of section 3090 above quoted, is not always or necessarily the nominal maker of a check or other negotiable instrument. *Union B. & T. Co. v. Security-First Nat. Bank*, supra, 1937, 8 Cal.2d 303, 308, 65 P.2d 355; *Goodyear Tire, etc., Co. v. Wells Fargo Bank*, 1934, 1 Cal.App.2d 694, 702, 37 P.2d 483; *Rancho San Carlos v. Bank of Italy*, 1932, 123 Cal.App. 291, 295, 11 P.2d 424. In *Union B. & T. Co. v. Security-First Nat. Bank*, supra, the checks in question were cashier's checks of the plaintiff, issued at the request of an agent of one of plaintiff's depositors, made payable to persons named by him and delivered to him. He forged the payees' indorsements and obtained the money on the checks. It was held that regarding the payees named in the checks the plaintiff had no intent save that of following the agent's instructions and that since his intent was that fictitious payees be named, the checks were payable to bearer and plaintiff was not liable to the depositor for paying on forged indorsements. The faithless agent was named Williams and the court said on this point: 'The intended fictitious payee was the creature of Williams' mind, and while the appellant, *Union Bank*, was the nominal maker of the cashier's checks, still Williams was the person who actually drew the bill and was the person making the cashier's checks payable to a fictitious payee; and, since he acted within the scope of his authority, his act, intent, and knowledge, although adverse to and a fraud upon his principal, are nevertheless binding upon the latter.' 8 Cal.2d 309, 65 P.2d 358.

"In *Union B. & T. Co. v. Security-First Nat. Bank*, supra, the court cited with approval *Rancho San Carlos v. Bank of Italy*,



supra, and Goodyear Tire, etc., Co. v. Wells Fargo Bank, supra. In the Rancho San Carlos case the plaintiff delivered to an employee named Harris, who had no authority to sign its checks, several duly signed checks on defendant bank which were blank as to payees' names and amounts. This was done, according to custom, to enable Harris to pay plaintiff's bills. Harris filled out one of these checks for \$10,000, naming as payee a real person who had no interest in it and was not intended by Harris to receive it, forged this payee's name and contrived to get the money. It was held that plaintiff, by delivering the blank checks to Harris, gave him authority to fill the blanks, and further (at 123 Cal.App. 295, 11 P.2d 426): 'It has been held that the words "the person making it so payable," refer to the person who actually drew the check, whether he be the nominal maker or not [citing cases]; and in principle the same rule should apply where the person who actually makes the check payable is expressly or impliedly authorized to complete it in that manner.' For this reason it was held that the check was payable to bearer, under section 3090 of the Civil Code, and defendant bank was not liable to plaintiff as for payment on a forged indorsement.

"In the Goodyear case, supra, 1934, 1 Cal.App.2d 694, 37 P.2d 483, the plaintiff sued to recover money which it had deposited in defendant bank and which the latter had paid out on duly signed checks of plaintiff. The plaintiff required two signatures on its checks, one of the authorized persons, Downs, being also its controller and in charge of its accounts. Downs wrote a number of checks to fictitious payees, representing no obligations of the corporation, and presented each of them to a cosigner, with or without supporting documents, sometimes signing it before and sometimes after the cosigner did. The cosigners signed the checks without investigation, depending on Downs and the system for assurance of their correctness. Downs then stole the checks, forged the payees' signatures and got the money they called for. It was held that these checks were, in contemplation of law, payable to bearer, and defendant was not liable to plaintiff on account of the forged indorsements. The court discussed the matter at great length and among other things said, at 1 Cal.App. 2d 709, 37 P.2d 489: 'On the facts of this case the cosigners of Downs were mere automatons. Their names on the instru-

ments gave them no more validity than did the corporate name printed thereon. They had just as much general intent with reference to the instruments involved as their corporate employer, and no more. For all practical purposes their names as well as that of the corporation might have been printed upon the checks. It is difficult to understand why any insurmountable legal barrier is created merely because on the facts in this case cosigners were required to affix and went through the motions of affixing their names at the time the checks were in the process of being drawn. If the cosigners had signed the checks in question in blank, then based upon every rule of reason and on the clear authority of the San Carlos case, supra, the checks were "bearer" checks. It would be no answer to say that authority to sign in blank was not given, for the act of signing would be within the scope of the authority of the cosigners. The facts in this case establish beyond cavil that the cosigners did, as a practical matter, sign in blank.'

"Under the facts of the case at bar Hadley was in substantially the same situation as that given to the cosigners of Downs in the case just quoted. Hadley did not even look at the names of the payees on a check and either he had no actual intent at all regarding them, or if he had any such intent it was, at most, to make the checks payable to the persons intended by Ellis, and was thus like that of the bank which issued the cashier's checks involved in Union B. & T. Co. v. Security-First Nat. Bank, supra, 1937, 8 Cal.2d 303, 308, 65 P.2d 355. There must be an intent somewhere as to the payee to be named in a check and if the signer of the check has none that intent must be sought elsewhere. If the plaintiff should use a check writing machine by which signatures were mechanically placed on checks, without any intention to the contents of the checks by the persons whose signatures were thus placed on them, it is obvious that such persons would have no intent whatever in regard to such checks and the intent of those authorized to operate the machine, devoid of intent, and the intent which determines the character of the check, on the question whether the payee's name is fictitious, must be that of the one who operated the machine, in this case, Ellis. As in the Goodyear case, supra, 1934, 1 Cal.App.2d 694, 37 P.2d 483, 490, the signature, though made after the payee's name was in the check, was 'as a practical matter, sign in

blank,' and hence is subject to the rule of the San Carlos case supra, 1932, 123 Cal. App. 291, 11 P.2d 424.

"In the opposition to this conclusion plaintiff cites and relies on Los Angeles Inv. Co. v. Home Sav. Bank, 1919, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193. The plaintiff there was a corporation doing an extensive business, with several departments. One of these, in charge of one Emory, as manager, made many disbursements by check. Emory had no authority to sign checks, and to obtain a check prepared a demand showing the purpose of the payment and the person to whom it was to be made. This demand was sent to the accounting department where it was examined and if found correct a check was prepared and presented with the demand to the officers authorized to sign checks and the signed check was returned to Emory's department for delivery to the payee. Emory, like Ellis in this case, prepared fictitious demands, and one real demand, in favor of named persons, some of whom were fictitious and some real, got possession of the checks signed for these demands, indorsed the payees' names on them and thereby obtained the money payable on them. The checks were drawn on defendant bank and plaintiff sued to recover the amount paid on these forged indorsements. One of the defenses was that the checks were in law payable to bearer, because of Emory's intent regarding them, but the court said, at page 606 of 180 Cal., at page 295 of 182 P., 5 A.L.R. 1193, 'Emory did not execute the checks on behalf of the company. It is the intention of the officers who did that must be taken to be the intention of the company. The execution of the checks was one within the scope of their authority, not within that of Emory. As to these officers, it is plain that they did not intend to execute checks to fictitious parties or to pay money to the person to whom Emory intended it should be paid, to wit, himself. They intended to pay money to what they believed to be existent persons, and, this being so, the checks cannot be considered as made to fictitious payees.' This

statement, while accurate enough as applied to the facts of that case, does not entirely conform to the later decisions just reviewed, and some limitation must be put upon it to bring it into such conformity. In that case an audit was interposed between Emory, who prepared the demands, and the officers who signed the checks, the purpose of which was to determine whether the checks were proper or not. The signing of officers were not mere automatons but acted upon the results of such audit and it was quite proper to regard them as having an intent regarding the checks. But where the actual signer of the check has and in the nature of the operation can have, no intent at all as to the payee, as where he signs in blank (Rancho San Carlos v. Bank of Italy, supra, 1932, 123 Cal.App. 291, 11 P.2d 424) or complies with the request of another, with no intent except to do what is asked (Union B. & T. Co. v. Security-First Nat. Bank, supra, 1937, 8 Cal.2d 303, 65 P.2d 355), or is a mere automaton signing without intent (Goodyear Tire, etc., Co. v. Wells Fargo Bank, supra, 1934, 1 Cal.App.2d 694, 37 P.2d 483), it is obvious that the character of the check cannot be determined on his nonexistent intent, and the controlling intent is that of the person who, within the scope of his authority, fixes the name of the payee. In this case that person was Ellis. It must be understood that our decision is based on the system, which was so set up by plaintiff as to eliminate from the duty of Hadley, as the actual signer of a check, any consideration of its propriety, and particularly to relieve him from any necessity of even looking at the payee's name. If he had any duty in these respects, but performed it negligently or perfunctorily or even omitted to perform it at all on some particular occasion, a different result might follow."

The judgment should be reversed.

CARTER, J., concurred.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

**ANGLO CALIFORNIA NAT. BANK OF  
SAN FRANCISCO v. KIDD et al.**

**LEVY v. SAME.**

**KIDD v. ANGLO CALIFORNIA NAT.  
BANK OF SAN FRANCISCO et al.**

**Civ. 11760.**

District Court of Appeal, First District,  
Division 1, California.

May 21, 1943.

Rehearing Denied June 19, 1943.

Hearing Denied July 19, 1943.

**1. Execution ⇨116**

Where more than one year had elapsed since issuance of each of five executions at time of issuance of sixth execution in 1935, and the property which had been distributed to trustee in 1928 was not in hands of an executor or administrator, vitality of the first five executions had terminated. Code Civ.Proc. § 688.

**2. Executors and administrators ⇨315(6)**

Language of amended decree of distribution was determinative of terms of will.

**3. Wills ⇨630(3)**

Where property, pursuant to will, was held in trust for payment of income to beneficiary until he attained age of 30 years and payment of principal to him on reaching such age, and to others in case of beneficiary's death before he reached age of 30, beneficiary's interest in principal prior to date he reached age of 30 years was a "future" and not a "present interest" and was "contingent" and not "vested" and hence was not subject to execution.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingent Interest", "Future Interest", "Present Interest", and "Vested Interest".

**4. Wills ⇨630(3)**

Where property was held in trust pursuant to will for payment of income to beneficiary until he attained age of 30 years and payment of principal to beneficiary on reaching such age, or to others in case of death of beneficiary before reaching age of 30, beneficiary had privilege of disposing of his contingent interest in corpus of trust, but during existence thereof there was no investiture of title to the property in the beneficiary.

**5. Wills ⇨630(3)**

Where property, pursuant to will, was held in trust for payment of income to beneficiary until he attained age of 30 years, and payment of principal to him on reaching such age or to other persons in case of beneficiary's death before reaching age of 30, beneficiary might enforce performance of the trust if the contingency affecting his interest actually occurred. Civ.Code, § 863.

**6. Wills ⇨630(2)**

A postponement of payment of legacy does not ipso facto create a "future contingency" and nature of contingency is dependent on language used describing it and circumstances surrounding making of bequest.

See Words and Phrases, Permanent Edition, for all other definitions of "Future Contingency".

**7. Wills ⇨630(3)**

Where property, pursuant to will, was held in trust for payment of income to beneficiary until he attained age of 30 years and payment of principal to him on reaching such age, or to others in case beneficiary did not attain age of 30, attaining such age was a "condition precedent" to beneficiary's obtaining estate in fee in the whole property.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

**8. Execution ⇨31**

A contingent interest, depending on dubious or uncertain event, is not subject to execution until reduced to possession.

**9. Wills ⇨743**

A prospective interest of a legatee is subject to sale or assignment if sale or assignment is fair and not against public policy Civ.Code, §§ 700, 703, 1045.

**10. Assignments ⇨31**

The form of a written equitable transfer or assignment based on valuable and reasonable consideration is not important if intention of transferor is ascertainable and the instrument is actually delivered.

**11. Trusts ⇨147(1)**

Written assignments of beneficiary's contingent interest in corpus of testamentary trust, which were based on valuable consideration, were valid and were not subject to execution issued on judgment



against beneficiary after the contingency occurred and the estate vested. Civ.Code, § 700, 703, 1045.

**12. Appeal and error** ⇨1010(1)

Findings of trial court based on substantial evidence are binding on reviewing court.

**13. Execution** ⇨116

Writ of execution was not effective for more than three years after its issuance. Code Civ.Proc. § 542b.

**14. Trial** ⇨377(2)

Denial of motion to set aside submission of case in order to permit introduction of further testimony was not error where no plausible reason was offered why the testimony was not introduced at the trial.

**15. Pleading** ⇨150

Where first defendant answered complaint in interpleader and filed cross-complaint, and second defendant answered original complaint and first defendant's cross-complaint, and filed a cross-complaint, even if first defendant's failure to answer second defendant's cross-complaint was tantamount to admission of certain allegations, in view of other pleadings it was not a concession that judgment should be entered on those facts.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Interpleader action by the Anglo California National Bank of San Francisco against William E. Kidd, Louis L. Levy, and others, wherein cross-complaint was filed by Louis L. Levy against William E. Kidd and others, and cross-complaint was filed by William E. Kidd against the Anglo California National Bank of San Francisco and another. From an adverse judgment, William E. Kidd appeals.

Affirmed.

William Sea, Jr., of San Francisco, for appellant.

Henry Gross and John O'Gara, both of San Francisco, for respondent.

WARD, Justice.

This action in interpleader was brought by plaintiff bank. The conflicting claimants are respondent Louis L. Levy and appellant William E. Kidd. A motion for

diminution of the record, interposed by appellant prior to submission of the cause, was granted. In the determination of the appeal all additional records, affidavits, etc. have been considered.

The complaint of the bank, trustee under the will of Edith Lindow, alleged that the superior court in the matter of her estate "made and entered its amended decree of final distribution, whereby it ordered distributed to Anglo-California Trust Company, this plaintiff's predecessor in interest, certain property belonging to the Estate of said decedent, Edith Lindow, in trust for certain purposes therein set forth, namely, that said trustees should pay the income from the principal of said fund to Carl W. Lindow, a son of said decedent, annually until he attains the age of thirty years, and upon his reaching the age of thirty years, the said trustee should pay and deliver the principal sum to him. [It is further alleged] That the said Carl W. Lindow is now living and is of the age of thirty years. That the said fund and the said property, after accountings duly made to this court, consists of the items" enumerated in an exhibit attached to the complaint.

As the result of a judgment obtained in 1933 against Carl Lindow in the amount of \$464.50, seven writs of execution were issued. There was partial satisfaction thereof on two occasions in the amounts of \$129.52 and \$3.95. Following the sixth execution, the sheriff purported to sell on August 16, 1935, all the right, title and interest of the son in the estate of his mother, worth several thousand dollars, for the sum of \$5. The purchasers (judgment creditors), who had in 1933 assigned their judgment to appellant Kidd, also assigned to him all their right, title and interest in the certificate of sale. The sale occurred over two years before the time Carl Lindow reached the age of thirty years.

Respondent Levy is the assignee of Carl Lindow and of other assignees of the son, covering all his right, title and interest in and to the trust fund and property. The court found that all except two of such assignments were made for a valuable consideration. As to the two, it made no finding in that regard.

[1] The first five executions may be disregarded. At the time of the sixth execution on July 24, 1935, more than one year had elapsed since the issuance of each of them. The property was not in the

hands of an executor or administrator; it had been distributed to the trustee in 1928. The vitality of the first five executions had terminated. Code Civ.Proc. § 688. The seventh execution was issued after Carl Lindow had reached the age of thirty years, prior to which time he had assigned and released to Levy and others the corpus and income of his mother's estate.

It is the contention of respondent that the interest of Carl Lindow at the time of the sixth execution (the only one necessary to consider here), more than two years before he reached the age of thirty years, was a contingent interest; and that the purported sale by the sheriff had no legal effect upon the principal of the trust. In view of the facts this contention must be upheld.

[2-5] The language of the amended decree of distribution which is determinative of the terms of the will (In re Estate of Easterday, 45 Cal.App.2d 598, 114 P.2d 669) indicates that the properties of the decedent were distributed to the trustee subject to conditions subsequent, namely termination when Carl Lindow reached the age of thirty years, or before that period in case of his death, in which latter event the estate should vest in other named parties. Carl's interest was not a present, but a future, interest; not vested but contingent. Until he reached the age of thirty years his only interest or title was in the income. In re Estate of Blake, 157 Cal. 448, 108 P. 287; San Diego Trust, etc., Bank v. Heustis, 121 Cal.App. 675, 10 P.2d 158. He had the privilege of disposing by sale, transfer or otherwise of his contingent interest in the corpus of the trust (In re Estate of Easterday, supra), but during the existence thereof there was no investiture of title to the property in Carl. In re Estate of Troy, 214 Cal. 53, 3 P.2d 930; In re Estate of Hamon, 136 Cal.App. 517, 29 P.2d 326. Under such condition the beneficiary has no vested interest but may enforce the performance of the trust (Civil Code, § 863) if the contingency affecting his interest actually occurs. Blackstone Commentaries, Jones Edition, Book I, pp. \*169, \*170, \*171.

[6, 7] A postponement of payment does not ipso facto create a future contingency. The nature of the contingency is dependent upon the language used describing it, and circumstances surrounding the making of the bequest. In the present instance the

testator devised the legal title to the trustee—the trust to terminate in the event of Carl's death before he reached the age of thirty years, in which event the trust property was to go, not to the estate of Carl, but in the event he left no lawful issue to certain designated persons. Under such provision the estate in fee in the whole property could not vest in Carl unless he reached thirty years of age. Attaining that age was a condition precedent. In re Estate of Blake, supra; San Diego Trust, etc., Bank v. Heustis, supra; In re Estate of Rogers, 94 Cal. 526, 29 P. 962.

Appellant seems to take the position that the interest of the testatrix' son is not contingent, but, rather, a vested interest, liable to divest on the contingency of the son's death before reaching the age of thirty years. The objections to execution upon a contingent future interest apply equally where the interest is vested but likely to divest on the happening of a condition subsequent. It cannot be known in advance whether the trust funds, aside from possible income for an indefinite period, will come into possession and enjoyment. Appellant's argument and the citations submitted thereon—that the interest is a vested one, liable to divest rather than a contingent interest—is not convincing. In two of the cases cited (In re Estate of Blake, supra, and San Diego Trust, etc., Bank v. Heustis, supra), the interest was held to be contingent rather than vested.

[8] A contingent interest, depending as it does upon a dubious or uncertain event, is not subject to execution until reduced to possession. Freeman on Executions, Vol. 2, sec. 178, p. 905; 23 R.C.L., sec. 133, p. 578; 69 Corpus Juris (Wills), sec. 2611, p. 1247; San Diego Trust, etc., Bank v. Heustis, supra; Kelly v. Kelly, 11 Cal.2d 356, 79 P.2d 1059, 119 A.L.R. 71. The rule is sound, based upon the well-known fact that ordinarily on a forced sale of such an interest a nominal price only is obtained, to the injury of the judgment debtor.

[9] The above rule does not prohibit the outright sale or transfer of the uncertain, prospective interest of a legatee providing the sale or assignment is fair and not against public policy. This rule of equity is recognized notwithstanding the rules set forth in Civil Code, §§ 700, 703, 1045. Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L.R.A., N.S., 404; Kelly v. Kelly,

supra; Caldwell v. Rosenberg, 47 Cal.App. 2d 143, 117 P.2d 366; Cannon v. Chapman, 24 Cal.App.2d 448, 75 P.2d 522.

[10-12] The form of a written, equitable transfer or assignment, based upon valuable and reasonable consideration, is not important if the intention of the transferor is ascertainable and the instrument is actually delivered. McKay v. Security-First Nat. Bank, 35 Cal.App.2d 349, 96 P.2d 376; Goldman v. Murray, 164 Cal. 419, 129 P. 462. In the present case there is no question of a verbal gift. Carl executed written assignments to various parties. Assuming that some of them were not in generally accepted form, still the findings of the trial court, based upon substantial evidence, such as subsequent releases, are binding on a reviewing court. McKay v. Security-First Nat. Bank, supra.

Appellant also urges that the levies would reach the income if not the corpus. The findings are to the effect that on June 18, 1938 there was a balance of income on deposit of \$755.78. It was incumbent upon appellant to prove any part of this amount, other than the sum of \$3.95 upon which execution was levied, to have been in the hands of the trustee at the time of the sixth execution. The terms of the trust required payment of the income annually to Carl Lindow. No further writs of execution were issued between the sixth and the date when he reached the age of thirty years.

[13] Assuming the possibility that the writ of July 24, 1935 would reach subsequent income, the writ was not effective for more than three years. Code Civ.Proc. § 542b. The present action was brought in August, 1938.

[14] It is contended that the court erred in denying a motion to set aside the submission of the case. Appellant wished to show that in a former action, in which some of the parties herein were involved, there was certain testimony relative to an assignment to Russell that might be of advantage to appellant here. The action referred to was tried in 1934. The levy of 1935 was ineffective and the assignments operative. The testimony sought to be introduced appears immaterial. Assuming its materiality, however, no plausible reason was offered why it was not introduced during the present trial.

[15] Appellant also notes that respondent failed to answer appellant's cross-complaint. Respondent answered the complaint in interpleader and filed a cross-complaint. Appellant filed an answer to the original complaint and an answer to the cross-complaint of respondent. Assuming that such failure was tantamount to an admission of certain allegations, in view of other pleadings it was certainly not a concession that judgment should be entered on those facts. No objection was presented by appellant during the trial and no request made to enter a default judgment on the cross-complaint. It does not appear that if a formal answer to appellant's cross-complaint had been filed a different judgment could have been rendered.

Other objections by appellant are trivial and technical; none of them would warrant a reversal. This case resolves itself upon the principle that the interest in the trust corpus, as found by the trial court, was contingent and not subject to execution.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



58 Cal.App.2d 673

**CARRASCO, Chief of Division of Labor Statistics and Law Enforcement, Dept. of Industrial Relations, v. GRECO CANNING CO., Inc.**

No. 12268.

District Court of Appeal, First District,  
Division 2, California.

May 21, 1943.

#### 1. Limitation of actions §66(12)

For purposes of statute of limitations, cause of action for money payable on demand accrues with inception of obligation and without necessity for any demand. Code Civ.Proc. § 339.

#### 2. Limitation of actions §66(12)

Where oral contract provided for payment to employee of additional \$50 per month to be held for employee pending de-



mand, two-year statute of limitations commenced to run immediately upon accrual of each installment without demand. Code Civ.Proc. § 339.

### 3. Limitation of actions ⚡66(12)

Under oral agreement for payment to employee of additional monthly sums of \$50 payable on employee's demand, statute of limitations did not bar cause of action as to any installment accruing within two years next preceding commencement of action and prior to termination of employment. Code Civ.Proc. § 339.

### 4. Limitation of actions ⚡28(1)

Unsigned informal memorandum regarding employee's claimed increase in salary accruing monthly payable on demand found in memorandum book of employee's father, who was then president of employer was not an "instrument in writing" within meaning of four-year statute of limitations and two-year statute was applicable. Code Civ.Proc. §§ 337, 339.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument in Writing".

### 5. Corporations ⚡308(11)

Where employee under oral contract was entitled to monthly additional pay payable on demand, showing that employee worked five months under receiver of corporate employer before notifying receiver of claim for any additional salary, and that on making claim employee stated increased amount was payable when company's funds were in better position, did not compel finding that claim was barred by "laches" or "estoppel".

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Laches".

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Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by H. C. Carrasco, Chief of the Division of Labor Statistics and Law Enforcement, Department of Industrial Relations, State of California, as assignee of Fortunate E. Greco, against Greco Canning Company, Inc., to recover unpaid wages. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

William A. Boekel and John D. Gallaher, both of San Francisco, for appellant.

Jensen & Holstein of San Jose, for respondent.

### SPENCE, Justice.

Plaintiff, as the assignee of Fortunate E. Greco, brought this action alleging that "within two years last past defendant became indebted to Fortunate E. Greco for work and labor done and performed \* \* \* at the special instance and request of said defendant in the sum of \$1300.00, which said sum defendant promised and agreed to pay therefor." The complaint was filed on June 4, 1940. The defendant denied said allegations and affirmatively alleged that at all times mentioned in the complaint up to September 1939, said employee had been employed by defendant at the agreed salary of \$265 per month, which salary had been fully paid. It was further alleged that the alleged cause of action was barred by the provisions of section 339 of the Code of Civil Procedure and by "laches, delay and estoppel". The trial court found that all the allegations of the complaint were true. It further found that "there was an agreement between Fortunate E. Greco, the plaintiff's assignor and the defendant Greco Canning Company, a corporation, for an increase in salary of \$50 per month from July 1, 1937, to September 30, 1939"; that said employee was in the employ of defendant between those dates and that the sum of \$1,300 remained due, owing and unpaid from defendant to plaintiff. The trial court also found against defendant's pleas that the cause was barred. Judgment was entered in favor of plaintiff in the sum of \$1,300 and defendant appeals.

Defendant contends that the claim was barred by the provisions of section 339 of the Code of Civil Procedure and that the trial court erred in finding to the contrary. It points to the fact that the only agreement shown by plaintiff's evidence was an oral agreement made in June 1937 between the employee and his father, who was then president of the defendant company, to pay the increase of \$50 per month beginning on July 1, 1937. Their testimony showed that the employee had an opportunity to take another position and that the father then agreed "to give me an advance of \$50 a month beginning July 1st, and when he agreed to give me that, it was also agreed between us that that was going to be paid to me at a later date, that the money would accrue to me and for me." The employee was asked "And was that to be

paid to you upon your demand?" He answered "That was to be paid me any time that I demanded it in the future, it was accruing for me." The following is found in the testimony of the father:

"Q. Now, which was the agreement, that it was to be paid upon demand by him, or at your pleasure? A. The agreement was that it was to be paid on demand by him, but I stalled him. The pleasure was mine to give it to him whenever I thought it was the right time.

"Q. Well, the agreement really was that it was to be paid on your pleasure? A. No, on demand."

[1] In support of its contention that the statute had run, defendant cites *Clunin v. First Federal Trust Co.*, 189 Cal. 248, 207 P. 1009; *Miguel v. Miguel*, 184 Cal. 311, 193 P. 935, and 16 Cal. Juris. 492. The rule is stated in the California Jurisprudence citation as follows: "Where a right has fully accrued except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he chooses, the cause of action has accrued for the purpose of setting the statute of limitations running." And in the *Miguel* case, the court said at page 314 of 184 Cal., 193 P. at page 936, "That a cause of action for money payable on demand accrues with the inception of the obligation and without the necessity for any demand hardly requires the citation of authority."

[2,3] Accepting, as did the trial court, the testimony offered by plaintiff, the action was one upon the oral agreement of June 1937 to pay upon demand installments of \$50 each accruing monthly thereafter during the employment of the employee. Under that agreement, the right to the payment of a \$50 installment "fully accrued" each month except for a demand which the employee could make at any time. It therefore seems clear under the principles set forth in the authorities cited that the statute of limitations commenced to run immediately upon the accrual of each \$50 installment without any demand and that plaintiff's right of action for the recovery of each such installment was barred by the statute two years after such installment accrued. It seems equally clear, however, that plaintiffs cause of action was not barred by the statute as to any installment which accrued within two years next preceding the commence-

ment of the action and prior to the termination of his employment on September 30, 1939.

[4] With respect to the statute of limitations, it is suggested by plaintiff at one point in his brief that there was a "legal written agreement made June 17, 1937", which made the four year statute rather than the two year statute applicable. The suggested "written agreement" consisted merely of an unsigned, informal memorandum, regarding the claimed increase in salary of the employee, found in a memorandum book which was the "personal book" of the father of the employee. Plaintiff cites no authority holding that such memorandum may be deemed an "instrument in writing" within the meaning of section 337 of the Code of Civil Procedure and it is clear that neither the pleadings or findings support the theory that this action against the defendant corporation was one upon a "contract, obligation or liability founded upon an instrument in writing" within the meaning of that section. We are therefore of the opinion that the two year statute was applicable. Code of Civil Procedure, section 339.

[5] Defendant further contends that the claim was barred by "laches, delay and estoppel" and that the trial court erred in finding to the contrary. Defendant points out that a receiver was appointed for and was handling the affairs of the defendant corporation from May 1939 to September 1939; that the employee accepted from the receiver salary checks amounting to \$265 per month during that period; that the employee did not notify the receiver of any claim for any additional salary until September 1939; and that when said claim for additional salary was made, the employee based the claim upon an alleged oral agreement which the employee then stated had provided for the increased amount "payable when the company's funds were in better position, retroactive to July 1, 1937" While these facts had some tendency to discredit the testimony offered by plaintiff regarding the existence and terms of the alleged oral agreement, we find nothing in these facts which compelled a finding that the claim was barred by laches, delay or estoppel.

The judgment is reversed with directions to the trial court to modify the judgment by deducting therefrom the installments which were barred by the statute of limi-

tations under the views expressed herein. Appellant will recover its costs on this appeal.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.



58 Cal.App.2d 704

**SEVERN v. RUHDE et al.**

Civ. 13975.

District Court of Appeal, Second District,  
Division 2, California.

May 21, 1943.

# 1. Deeds ⚡194(2)

Grantee's possession of deed and production thereof in court raised a presumption of "delivery" that could be overcome only by the most satisfactory, clear, and convincing evidence of nondelivery.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

# 2. Deeds ⚡194(2)

That deed to daughter was withheld from record to avoid payment of taxes, that mortgage to raise money for home for grantor and daughter was subsequently executed by grantor, and that grantor continued to collect rents, turning them over to daughter, did not overcome positive testimony as to delivery of deed and presumption of delivery arising from daughter's possession of deed.

# 3. Evidence ⚡230(3)

Declarations of grantor, made in connection with execution of joint tenancy deed to son and showing that grantor then claimed to be owner of realty conveyed, were inadmissible to defeat title of daughter to whom grantor had several years earlier executed and delivered a deed to the realty.

# 4. Evidence ⚡230(3)

Declarations of a grantor, after he has parted with his title, tending to show retention of title, are not admissible against those claiming under grantor.

# 5. Deeds ⚡8

Grantor having conveyed all her interest in realty to daughter conveyed nothing by subsequent delivery to son of a joint tenancy deed to the same realty.

# 6. Deeds ⚡8

Prior unrecorded deed to realty was conclusive as against one not a purchaser for a valuable consideration named as grantee in subsequent conveyance by same grantor. Civ.Code, § 1107.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by D. L. Severn, as administrator with the will annexed of the estate of Pheba A. Cassey, deceased, against Bea Ann Ruhde and another to quiet title to certain realty conveyed by decedent during her lifetime to defendants and to require reconveyance thereof by defendants, wherein defendants filed cross-complaints. Judgment for plaintiff, and defendants prosecute separate appeals.

Judgment reversed.

J. E. Simpson, of Los Angeles, for appellant.

W. I. Gilbert, Jr., of Los Angeles, for respondent.

W. J. WOOD, Justice.

Pheba Ann Cassey died on April 11, 1941, at the age of 87 years, leaving a will dated March 31, 1941, in which she gave all of her property to her four children in equal shares. She had given a deed to a parcel of real estate to her daughter, Bea Ann Ruhde. This deed bore the date of August 12, 1938, and was acknowledged on February 15, 1939. She gave a joint tenancy deed dated March 18, 1941, covering the same property to her son, George Vernon Cassey, in which he was named as joint tenant with herself. This deed was recorded on the day of its date. In this action the administrator with the will annexed of the estate of Pheba Ann Cassey seeks to quiet title to the real estate described in these two deeds and to require reconveyances by the grantees named in the deeds. The trial court having rendered judgment in favor of plaintiff, separate appeals are prosecuted by Bea Ann Ruhde and George Vernon Cassey.

In the first count of the complaint plaintiff sets forth the usual allegations of an



action to quiet title. In the second count plaintiff alleges that when decedent signed the conveyance in favor of defendant Ruhde she instructed said defendant not to record the instrument until after her death and further "instructed" her that "she would continue to exercise management and control over said property and collect the rents therefrom." The complaint contains no allegation that the deed was not delivered to defendant Ruhde. In several other counts plaintiff sets forth various allegations concerning the execution of the joint tenancy deed to defendant Cassey, stating that decedent had instructed said defendant not to record the instrument until after her death, and that the deed to Cassey had been procured fraudulently, without consideration and in violation of his confidential position. The trial court filed findings sustaining the allegations of the complaint as to defendant Cassey. The court also filed findings sustaining the allegations of the complaint as to defendant Ruhde and further found that decedent did not deliver or intend to deliver the instrument of conveyance to defendant Ruhde.

Mrs. Ruhde now contends that the findings as to non-delivery of the deed to her are without support in the evidence. She testified that decedent and the witness had lived together about five years prior to decedent's death; that in March, 1939, decedent had delivered to her a deed to the property in question and that the witness had kept the deed at all times in her possession in a little box with her insurance papers, except for the time the deed was in the office of the county recorder; that at the time of the delivery of the deed decedent told her she wanted the witness to have the property since the boys had had their share; that at the time of the delivery of the deed she gave to decedent the sum of \$1; that practically all of the time after the delivery of the deed the witness received from decedent the rents from the property; that decedent "did go out and collect them because she always liked to visit with the tenants"; that decedent was the widow of a Civil War veteran and a Gold Star mother and there was discussion between the witness and decedent concerning the fact that taxes would have to be paid on the property if the deed to the witness should be recorded; that she "thought it was alright as it was"; that on April 26, 1940, decedent executed a mortgage on the property in the sum of \$500, the note, but not the mortgage, being signed by the witness; that this sum

of \$500 was used as part payment for a home in Artesia, where the witness and decedent lived; that the deed was recorded at the suggestion of decedent shortly before her death.

The testimony of defendant Ruhde is supplemented by the testimony of a number of witnesses who stated that decedent had told them before the delivery of the deed that she intended to convey the property to her daughter and by the testimony of other witnesses who stated that decedent had told them that she had conveyed the property to her daughter. The witness R. H. Bailey testified that he boarded and roomed at defendant Ruhde's home and was present at the time of the delivery of the deed to her; that decedent handed the deed to Mrs. Ruhde saying, "Daughter, here is a deed to the property. I want you to have it, because the boys have their own homes and their own jobs and can take care of themselves, and I know if I get sick you will take care of me, and I want you to have the property"; that decedent also said to her daughter, "To make this legal you have to give me some money," whereupon Mrs. Ruhde gave a dollar to decedent.

[1] A presumption of delivery arose from the fact that Mrs. Ruhde, the grantee, actually had the possession of the deed and produced it in court. Although plaintiff could present evidence to rebut the presumption of delivery arising from the possession of the deed, "nothing but the most satisfactory evidence of non-delivery should prevail against the presumption." The evidence should be "clear and convincing." *Stewart v. Silva*, 192 Cal. 405, 409, 410, 221 P. 191. In the *Stewart* case the grantor executed a conveyance and in the presence of his attorney handed the deed to the grantee instructing the grantee not to record it until after his death and stating that he would continue to receive the interest on the property and pay the taxes. After delivery of the deed the attorney, on behalf of the grantor, prepared in the grantee's name an instrument by which the property was leased to another party. The trial court found that there had been no delivery of the deed but on appeal the judgment was reversed, the reviewing court holding that even if the trial court disbelieved the testimony of the attorney and the other witnesses who testified on behalf of the grantee with respect to the delivery of the deed, there was no evidence to overcome the presumption of delivery derived from

the fact that the grantee had possession of the deed; and that the fact that the grantor at the time of the delivery expressed a desire that the deed should not be recorded until after his death and intended to exercise acts of ownership thereon during his lifetime did not prevent the delivery from being effective if the grantor did in fact intend to deliver the deed. See also Longley v. Brooks, 13 Cal.2d 754, 92 P.2d 394.

[2] We find no evidence in the present case which destroys the positive testimony of defendant Ruhde and that of her witnesses concerning the delivery of the deed. The record is devoid of evidence that decedent instructed Mrs. Ruhde not to record the deed. Plaintiff points to the fact that the deed was kept by defendant Ruhde with papers belonging to her mother at her home but we fail to see how this circumstance is incompatible with Mrs. Ruhde's claim that the deed was delivered to her and was in her possession. A satisfactory explanation is given for the failure of Mrs. Ruhde to promptly record the deed. She also gave a reasonable explanation of decedent's actions in collecting the rents which, it is to be recalled, were turned over to Mrs. Ruhde. Since the property was left in decedent's name to avoid payment of taxes a reasonable explanation is presented for the execution of the mortgage by decedent to raise the sum of \$500 for a home for the mother and the daughter. The evidence upon which the trial court attempted to draw an inference of non-delivery of the deed is far from clear and convincing. These circumstances are not sufficiently substantial to justify a finding of non-delivery of the deed when confronted with the presumption arising from the possession of the deed by Mrs. Ruhde and the positive evidence presented by her that the deed was in fact delivered.

[3,4] Evidence was received by the court from defendant Cassey and witnesses in his behalf to establish that decedent went to the office of a lawyer and executed the joint tenancy deed and in so doing made various statements which indicated that she then claimed to be the owner of the property in question. This testimony related to declarations and transactions which occurred long after the execution and delivery of the deed to defendant Ruhde. The testimony may have been admissible in connection with the issues involved in the allegations concerning the joint tenancy deed but they were inadmissible to defeat the

title of defendant Ruhde. Declarations of a grantor after he has parted with his title tending to show retention of title are not admissible against those claiming under him. Ord v. Ord, 99 Cal. 523, 34 P. 83; Ross v. Wellman, 102 Cal. 1, 36 P. 402.

[5,6] Since decedent conveyed all of her interest in the property to Mrs. Ruhde, it is apparent that nothing was conveyed by the alleged delivery of the joint tenancy deed to defendant Cassey at a later date. Defendant Cassey was not a purchaser for a valuable consideration and the prior grant to his sister is conclusive as to him. Civ. Code, sec. 1107. It is therefore unnecessary to discuss herein his contention that the findings as to him are not supported by the evidence.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.



58 Cal.App.2d 677

PEOPLE v. MARTIN.

Cr. 3661.

District Court of Appeal, Second District,  
Division 1, California.

May 21, 1943.

Hearing Denied June 17, 1943.

#### 1. Criminal law ☞1001

The matter of granting probation, in the first instance, is within sound discretion of the trial court. Pen.Code, § 1203.2.

#### 2. Criminal law ☞1001

Discretion of trial court to revoke an order of probation is very broad. Pen. Code, § 1203.2.

#### 3. Criminal law ☞1001

Trial court may make an order revoking probation based upon facts presented in an informal charge from which trial court has reason to believe that accused has violated his probation or is unfit to be at large. Pen.Code, § 1203.2.

#### 4. Criminal law ☞1001

Probation may be revoked although accused has not violated conditions thereof. Pen.Code, § 1203.2.

**5. Criminal law ☞1001**

Breach of terms of accused's probation or accused's unfitness to enjoy liberty need not be established beyond reasonable doubt to authorize revocation of probation, but judge need only have reason to believe that such breach exists from report of probation officer or otherwise. Pen.Code, § 1203.2.

**6. Criminal law ☞1001**

Where accused who had been granted probation pursued a course of conduct calculated to deceive the probation officer, her employers, and her husband and his friends, record did not establish that trial court had abused its discretion in revoking the order admitting accused to probation notwithstanding that accused had not violated the specified conditions of her probation. Pen.Code, § 1203.2.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Sandra Alexander Martin pleaded guilty to counts of an information for forgery and grand theft, and was placed on probation and her probation was ordered revoked, and she appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

By information, appellant was accused of ten counts of forgery and ten counts of grand theft, to which she entered her plea of "not guilty". On June 20, 1938, by leave of the court, appellant withdrew her plea of "not guilty", pleaded "guilty" to the offenses charged in counts 1, 2 and 3 of the information and applied for probation. Thereafter appellant was sentenced as to said three counts to the California Institution for Women at Tehachapi, execution of said sentences was suspended and appellant was "placed on probation for a period of ten years under the following conditions: Defendant must serve the first nine months of her probationary period in the County Jail. Other counts are dismissed."

A report of probation officer regarding desertion of probationer was filed on Au-

gust 31, 1942, and a bench warrant issued. At the hearing thereon had on September 29, 1942, the court found appellant had violated the terms of her probation and thereupon revoked the same, ordering her committed to Tehachapi in accordance with the judgment of July 19, 1938.

This appeal is prosecuted from the order revoking probation, on the ground that "there is no evidence that the appellant violated any of the conditions of her probation."

At the time the trial judge suspended the sentences and placed appellant on probation, he made the following order: "Now, these sentences will be suspended and the court is going to place you on probation for a period of ten years. Now, as a condition of probation the court is going to order that you serve nine months in the county jail of Los Angeles County. Further than that, the court is going to make as a condition of probation an order that you in no way, manner or form attempt to sell that knowledge that you have gained by reason of your employment with this motion picture actress to any newspaper syndicate or to any company whatsoever; in other words, you have to be impressed with the fact that you were hired as a private secretary of this lady, and as such every piece of information and knowledge that you have received in that capacity should be confidential. Now, unless you can prove to this court that that relationship as secretary and employer is going to continue in effect, and whatever knowledge you have gained of her intimate life will be kept secret by you, the court is going to see to it that the terms of your probation will be revoked and you will be sentenced to Tehachapi for the term prescribed by law. In other words, you have a suspended sentence to Tehachapi hanging over your head. If you violate any of the terms of your probation, that is where you are going to go. Now, do you understand that distinctly?"

At the hearing for revocation of probation, the court stated: "Well, the defendant is before the court at this time by reason of a report from our Probation Department that she has violated the terms of her probation, not for one violation but for several violations. I take it, you gentlemen have had an opportunity to read over the very thorough investigation that our probation officer has filed in this case \* \* \*." Counsel for appellant admitted



that appellant had not reported to the probation officer as was required, and the court finally determined that the probation report also showed "many other violations \* \* \* such as leaving the State of California, using an assumed name, not notifying the probation officer where she was and then getting married \* \* \*." Also, that appellant had given a false mailing address at Bakersfield; that she had never lived there, and had gone under assumed names.

Section 1203.2 of the Penal Code provides: "At any time during the probationary period of the person released on probation in accordance with the provisions of these sections, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, re-arrest any person so placed on probation under the care of a probation officer, and bring him before the court, or the court may in its discretion issue a warrant for the re-arrest of any such person and may thereupon revoke and terminate such probation, *if the interests of justice so require, and if the court in its judgment, shall have reason to believe* from the report of the probation officer, or otherwise, *that the person so placed upon probation is violating any of the conditions of his probation*, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life \* \* \*." (Emphasis added.)

Appellant urges that there is no competent evidence that she was engaging in criminal practices, or that she had become abandoned to improper associates or a vicious life; further, that "the only authority of the probation officer, and of the court, was to show a violation or breach of the terms and conditions *imposed by the court* on the person, not any informal conditions imposed by the probation officer"; that when she was placed on probation the court imposed two conditions only, that she (1) serve nine months in the county jail and (2) keep inviolate the secrets of her former employer; that since she kept both of these conditions, it was an abuse of discretion for the court to revoke her probation and commit her to Tehachapi for some other act or acts which were not forbidden by the court. (Emphasis included.)

The report of the probation officer in regard to appellant's alleged violation of probation and upon which the order of revocation was apparently based, recites:

That on October 27, 1939, appellant reported to the Probation Office that she had secured a position as secretary to the manager of Furnace Creek Inn at Death Valley, which would not necessitate her handling money; that she was going there under the name of Sandra Martin (having formerly requested permission to use the name of Gale Payne which permission was refused); and that she would keep in communication with the probation officer at all times; that appellant did report during that season and during the season of 1940 and to April, 1941, and mail was addressed to her at Furnace Creek under the name of Sandra Martin. On June 9, 1941, she advised the probation officer that she had secured employment as secretary to Roland Swaffield of Long Beach, where she remained until some time in September, 1941, when it was learned that she had been working there under the name of Gale Payne. When her said employer learned of her court record he suggested it might be less embarrassing for them both if she obtained other employment. Appellant then informed the probation officer in October, 1941, that she was returning to her former employment in Death Valley. Nothing further was heard from her until April, 1942, when in response to an inquiry from the probation officer addressed to appellant at Furnace Creek Inn, she apologized for not reporting, gave her address as 2205 Milvia Drive, Bakersfield, and offered as an excuse for her negligence the fact that her father had been ill in Baltimore and she had "dashed" East and brought him to Bakersfield where he had friends and where appellant had completed arrangements to go to work for an oil company. When no report was forthcoming the following month, the probation officer wrote asking for more detailed information with regard to appellant's whereabouts and when she had left Death Valley, etc., and after two weeks he received an undated letter from her in which she took exception to his questioning her movements and particularly to a request that she come to the Los Angeles Probation Department for a personal interview. In this letter appellant stated: "I am not working, because I have home duties to attend to. My father cannot be left alone just now. I am sorry that I have been negligent in sending in those silly monthly reports—and that will be corrected if you will send me a supply of them. As I've

said before many, many times, I'd rather deal directly with you than with some branch office which doesn't know me and which only starts up rumor again in a small town. That is a fear which I shall never overcome, and is possibly one of the reasons why I prefer to stay out of Los Angeles if possible."

Probation officer requested an investigation by the probation officer of Kern County and on June 16, 1942, the latter reported that, as requested, calls had been made at the Tipton home on Milvia Street in Bakersfield; that Mrs. Tipton's attitude was definitely hostile and she stated appellant was not there; it appearing to said officer that appellant was not living there but was using the address for collecting her mail. Probation office received a letter on June 9, 1942, from appellant from the Bakersfield address, in which she stated she was going to take her father to a doctor in Sacramento and if she had to stay there any length of time she would write "you further—and will make an effort to get down to see you anyway." This is the last communication received from appellant, although two communications were later sent to her requesting further reports. During the latter part of June, 1942, Mr. Swaffield called at the probation office and reported that certain investigations made by him in his office revealed some irregularities in the handling of his accounts by appellant.

Appellant at an interview after her apprehension on September 3, 1942, stated that her reason for failing to keep in touch with the probation officer was that during the previous year and a half she had made an entirely new life for herself under the name of Gale Payne, under which name she obtained her position at Furnace Creek Inn; that she handled money during the time of her employment there and that she was bonded in the sum of \$2,000 the first year which was increased the last year; that on June 14, 1941, she was married in Las Vegas, Nevada, to Donald Colley, who is now in the United States Army, and that she kept this from the probation officer as she feared her husband would be advised of her past record; that there was nothing irregular in her dealings in Mr. Swaffield's office, except that she worked there under the name of Gale Payne and did not tell him of her marriage because she understood he was opposed to employing married women. She also stat-

ed she did not go to Baltimore to care for her father, did not bring him to California, but that she left Death Valley on March 16, 1942, and went to San Francisco to see her husband since she had been informed he would probably be sent overseas and she wished to see him before he left; that she waited there for three days before she discovered his division had already sailed. By pre-arrangement, she met a Mrs. Lichtenberg, daughter of Colonel Poe of the United States Army, whose husband was a friend of appellant's husband. Mrs. Lichtenberg suggested that she and appellant go to New Orleans where Colonel Poe was stationed as he could get them work with the government; appellant did obtain a civil service position at the Point of Embarkation, New Orleans, where she remained until July 22, 1942, by which time Colonel Poe had been sent overseas and his wife and daughter wished to return to California. Appellant came to California with them and through her New Orleans references, obtained stenographic work at Fort McArthur, where she was working when apprehended. She was living with Mrs. Poe and her daughter, using the name of Gale Colley, and when interviewed by her probation officer after her apprehension, appellant stated she never was in Bakersfield with her father and used Mrs. Tipton's residence merely as a mailing address, as she could not afford to have mail coming to her addressed to Sandra Martin. She also insisted that she had done nothing wrong and feared no investigation of her conduct.

Since the court, when making the order revoking probation, stated he was not taking into consideration the Swaffield matter regarding alleged irregularities of appellant in the handling of certain accounts when employed by Mr. Swaffield, no further reference will be made thereto, although there does appear in the record herein a supplementary report of the probation officer respecting the same.

While it is doubtless true, as contended by appellant, that "the law does not forbid one to leave the State of California while on probation" under certain circumstances, and "does not forbid a person taking another name than one's own", the record herein discloses that appellant pursued a course of conduct calculated to deceive not only the probation officer, but her employers, as well as the man she married and his friends, after she had been granted an

extraordinary relief from suffering the penalty for her offenses because the court believed she would remold herself into a good citizen. *People v. Fields*, 131 Cal. App. 56, 20 P.2d 988.

[1-3] "The matter of granting probation in the first place is within the sound discretion of the trial court. It has been referred to as 'an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted'. *People v. Hainline*, 219 Cal. 532, 534, 28 P.2d 16, 17. In section 1203 of the Penal Code [1203.2, as amended] it is provided that the court is authorized to revoke an order for probation if there is reason to believe from the report of the probation officer, or otherwise that the defendant has violated the terms of his probation. The discretion of the court to revoke an order of probation is 'very broad'. *People v. Fields*, 131 Cal. App. 56, 20 P.2d 988. No formal procedure is provided for presenting charges of violation of probation. The court may make an order revoking probation based upon facts presented in an informal charge from which the court has reason to believe that the defendant has violated his probation or is unfit to be at large. In *re Young*, 121 Cal.App. 711, 10 P.2d 154." *People v. Silverman*, 33 Cal.App.2d 1, 5, 92 P.2d 507, 509.

[4,5] In the case of *In re Young*, supra, it is stated at page 714 of 121 Cal. App., at page 156 of 10 P.2d: "The continued enjoyment of probation may depend upon the effect which the prisoner's liberty may have upon the peace or morals of society. A breach of the terms of probation and the unfitness of the prisoner to enjoy his liberty are not required to be established beyond a reasonable doubt according to the rule which prevails in ordinary criminal proceedings. It is only necessary that the judge shall have reason to believe them to be true from the report of the probation officer, or otherwise. No particular source, manner or degree of proof is required by statute. It may not be presumed a judge will arbitrarily revoke probation without reason therefor. Pursuant to our statute, however, the judge or justice having jurisdiction of the cause may, in the exercise of sound discretion, based upon facts presented in an informal fash-

ion, from which he has reason to believe the prisoner has violated his probation or it unfit to be at large, revoke the order suspending sentence and commit him to jail."

[6] After carefully reviewing the record presented to this court, we are unable to say that the trial court abused its discretion in revoking the order admitting appellant to probation.

For the reasons stated, the order appealed from is affirmed.

DORAN, J., concurs.

WHITE, Justice (concurring).

I concur. The authority of the court to revoke probation is not dependent upon the violation of the specific conditions imposed as terms of such probation. It is within the sound discretion of the court to revoke probation whenever the conduct of the probationer indicates that he has failed to re-establish himself as a worthy citizen of the State, or has demonstrated by his conduct that he is unfit to be at large, and that his continued freedom will impair, menace or jeopardize the peace or morals of society. *People v. Hunter*, 42 Cal.App.2d 87, 91, 108 P.2d 472; *In re Young*, supra; § 1203.2 of the Penal Code.

Hearing denied; CURTIS, J., dissenting.



58 Cal.App.2d 646

PEOPLE v. FELIX et al.

Cr. 620.

District Court of Appeal, Fourth District,  
California.

May 20, 1943.

Hearing Denied June 17, 1943.

#### 1. Weapons ☞17(4)

Evidence sustained conviction of three defendants for possession of blackjack. Gen. Laws 1937, Act 1970.

#### 2. Criminal law ☞260(11)

Where circumstances shown in evidence reasonably justify findings of trial court in prosecution tried without jury, opinion of reviewing court that circumstances might also be reconciled with in-



innocence of defendants would not justify reversal of conviction.

### 3. Criminal law §1023(12)

An order denying probation to accused who were convicted of possessing blackjack was not appealable. Gen. Laws 1937, Act 1970.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Arthur R. Felix and others were convicted of possession of a blackjack, and they appeal, and, from an order denying probation, they attempt to appeal.

Attempted appeal from order dismissed, and judgment of conviction affirmed.

N. D. Meyer and Winthrop O. Gordon, both of Santa Ana, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants and appellants were jointly charged with a felony, to wit, possession of a blackjack. They were tried without a jury and found guilty. Their appeal is taken from the judgment of conviction. But one point is made upon this appeal and that is that the evidence is insufficient as to any of the defendants to justify the conviction. The defendants concede that the instrument found in the car was a blackjack as defined by the Dangerous Weapons Control Law of 1923, as amended (Deering's Gen. Laws, 1937, Vol. 1, Act 1970, p. 993).

The evidence shows that on the night of November 15, 1942, there was a "free for all" fight at a dance hall at Indepencia, a small locality in Orange County; that most of the persons who attended the dance were Mexicans; that a great number of the young men wore "Zoot suits". According to the testimony of the defendants, they arrived at the dance just a few minutes before the fight started. All three admitted being involved in the fight. Two of them bore cuts and all three pleaded guilty to a charge of disturbing the peace arising out of the fight there that night. When that fight ceased, the defendants, apparently by common design, returned to the automobile in which they had arrived. The automobile belonged to and was driven by the defendant Monteverde. As they were

driving away from the scene they were stopped by officers, arrested and a blackjack was taken from the car. At the time they were arrested Monteverde and Felix were riding in the front seat. The blackjack was lying directly under Monteverde's knees on a rubber mat on the floor. It was covered with blood. Felix's hand was bleeding profusely. Defendant Anaya, who was seated in the back seat of the car, "had blood all over him". There was an empty bottle in the front seat of the car on the right-hand side which also had blood on it.

It is appellants' contention that the evidence is not sufficient to show a joint possession or control of the blackjack by all of the defendants so as to support their joint conviction of the crime charged; that the circumstances surrounding the existence of the blackjack in the car in question were "consistent with many reasonable theories of innocence of the defendants".

There was ample evidence to have justified the court in concluding that a blackjack was used at the fight by defendant Felix. One witness testified that he (the witness) was seated in his car just outside the dance hall; that "There was a big bunch arguing and I recall that Arthur (Felix) was in the middle of it. There was a young girl asking him not to fight. She says, 'Don't fight', and he says, 'It doesn't make any difference to me. I want to whip the man here'. He wanted to strike a middle-aged man \* \* \*." The witness then testified: "Well, the lights were put out and then the bunch of young boys that were there in the group scattered, and glass was heard broken, and then at that time I got out of my car and I noticed about six yards away from me that there was a man on the ground, they were stabbing him like this (indicating), a downward motion. I could see that he had an iron, a piece of iron of some kind, but I didn't know what it was. What I did then was to try to separate them. I did that and the man that was lying on the ground got up and left. To one side of me was my brother, and then the whole bunch of them jumped on us all of a sudden, and my brother and I run, but I didn't run very far because they caught up with me, and I didn't know what happened to my brother then after that. The first one that caught up with me struck me right now \* \* \* on the face here \* \* \*" with "something heavy \* \* \*. I fell to the ground. I

could feel that I was being cut all over my body and kicked."

One other witness testified that:

"About that time I saw those eight fellows coming toward me, and I tried to talk to them, and they backed me up against the corner of the hall there \* \* \* one closed in on me from one side, and then another one, and about that time I felt a blow on the head (indicating over the right upper portion of the head) and I fell then on this blow, and they piled on top of me and after that I don't know what happened.

"Q. Was that a blow from a fist or some instrument? A. Some kind of an instrument because I felt the downward blow on my head."

Another witness testified that:

"When I got there I just got hit four times in the head, two in the forehead and two in back \* \* \*.

"Q. Was that with a fist or some instrument? A. Some instrument \* \* \* I just went down. They (the bruises) were sunk, but no blood come out of them \* \* \* it did not break the skin \* \* \*.

"Q. But those two on the front of your head did break the skin? A. They did; they break my skull."

There were bottles found in the back seat of the car in addition to the one with blood on it found in the front seat. The circumstantial evidence here presented is amply sufficient to have justified the court in concluding that the three boys were operating as a "gang", with knowledge on the part of each as to the manner in which the operation was to be carried out when they arrived at the dance; that the presence of the blackjack was known to each of them both prior to and after the affray; and that it was used by at least one of them during the fight in which apparently all of them were engaged.

Although the defendants profess their entire innocence as to the possession of the blackjack and as to their participation in starting the fight, there is testimony that Felix "wanted to whip a man"; that he was in the argument; that immediately thereafter the lights went out and there was a sound of the breaking of glass and that a man was struck over the head with a blunt

instrument which did not break the skin. Felix further testified that: "I pushed him back and hit him when he went back. Q. And you knew that was disturbing the peace? A. It was kind of starting a fight there." The fight started within a few minutes after these defendants arrived. The damage seemed to have been done with broken glass and a blunt instrument. Two of the defendants, Anaya and Felix, had cuts on their hands. The blackjack was in Monteverde's car under his feet. His hands were not cut. This might indicate that Monteverde wielded the blackjack and Felix and Anaya wielded the bottles.

[1] There is sufficient evidence to hold that the possession of the blackjack was a crime chargeable to all of the defendants and that all of them, for the purposes here involved, knowingly had possession of it. *People v. Gonzales*, 72 Cal.App. 626, 237 P. 812.

[2] Defendants argue that from the evidence it might be just as reasonable to believe that some other persons did the striking with the blackjack, and in their effort to get rid of it threw it in defendants' car. This may have been a proper argument to a jury or to the trial court, but in the face of the court's conclusion and the evidence, we are impelled to believe that the trial court's conclusion is at least equally tenable, i. e., that the defendants were the ones who used the blackjack, who knew of its presence both before and after the fight, who put it in the Monteverde car, and for this purpose, at least, had joint control or possession of it. If the circumstances shown in evidence reasonably justify the findings of the trial court the opinion of the reviewing court that those circumstances might also be reconciled with the innocence of the defendants will not justify a reversal of the judgment. *People v. Del Prado*, 49 Cal.App.2d. 597, 122 P.2d 76.

[3] An order denying probation is not appealable. *People v. Bartley*, 12 Cal.App. 773, 108 P. 868. The attempted appeal therefrom is dismissed.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concur..

57 Cal.App.2d 910

**BASTAJIAN v. BROWN et al.**

Civ. 13875.

District Court of Appeal, Second District,  
Division 2, California.

April 22, 1943.

**Appeal and error** ⇐1185

Statement of facts in original opinion was modified on rehearing so as to expressly show that Supreme Court affirmed order vacating findings and judgment prepared by plaintiff and directing defendant to prepare findings and judgment on ground that plaintiff's findings and judgment had been inadvertently filed so that opinion should not imply that deception had been practiced on trial court.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

On petition for rehearing. Former opinion modified and petition for rehearing denied.

For prior opinion, see 135 P.2d 374.

Paul Vallee, Astor Elmassian, Geo. C. Woods, and C. P. Von Herzen, all of Los Angeles (Burton B. Crane, of Los Angeles, of counsel), for appellant.

Reynolds & Painter, of Los Angeles, for respondents.

**PER CURIAM.**

Plaintiff has filed a petition for rehearing in which he asserts that the opinion heretofore filed, Cal.App., 135 P.2d 374, 375, sets forth as facts matters which are untrue. He asserts that the statement in the opinion that "an appeal was taken from the order of September 20, 1937, resulting in the affirmance of the order" is "grossly unfair" to plaintiff and his counsel. A careful examination of the record discloses that no untrue statement appears in the statement of facts in the opinion. Plaintiff however, argues that it is to be implied from the opinion that the Supreme Court, 19 Cal.2d 209, 120 P.2d 9, affirmed the order of September 20, 1937, on the ground that deception had been practiced on the trial court in inducing the acceptance of the findings. He points out that the Supreme Court in affirming the order based its decision upon the ground that the trial judge was justified in making

the order of September 20, 1937, upon the ground that the signing of the findings and judgment in the first instance was a clerical error.

Notwithstanding the unwarranted criticism of the trial court and of this court contained in the petition for a rehearing, we prefer to relieve counsel for plaintiff of the fear that the opinion of the court will result in "degrading and besmirching" him.

It is ordered that the following words be inserted in the opinion of the court after the word "order" appearing at the end of the 17th line of page 2 of the opinion (in line 18 page 375, 135 P.2d): "upon the ground that the findings and judgment had been inadvertently filed".

The petition for a rehearing is denied.



58 Cal.App.2d 726

**In re BURKET'S GUARDIANSHIP.****McKINNEY v. BURKET.**

Civ. 14075.

District Court of Appeal, Second District,  
Division 2, California.

May 21, 1943.

**1. Guardian and ward** ⇐10

Minor who has attained age of 14 years has right to nominate guardian and court, if it approves nominee as a suitable person, must appoint guardian nominated. Probate Code, §§ 1405, 1406, 1440.

**2. Guardian and ward** ⇐8

In appointing a guardian pursuant to nomination of 14 year old minor, court acts under special proceeding authorized by Probate Code and power thereby conferred. Probate Code, §§ 1405, 1406, 1440.

**3. Courts** ⇐475(15)

Award of custody of minor by divorce court of Orange county to mother did not deprive probate court of Los Angeles county from appointing father guardian of such minor on nomination of minor after minor had attained age of 14 years. Probate Code, §§ 1405, 1406, 1440; Civ.Code, § 138.



#### 4. Guardian and ward ☞8

Statute authorizing divorce court to provide for custody and support of minor children has no application in matter of guardianship appointment, and was intended only for protection of children in cases of divorce. Civ.Code, § 138.

#### 5. Guardian and ward ☞8

Probate Code provision relating to appointment of guardians for minors was enacted especially to confer jurisdiction upon superior court to appoint guardians for minors residing or temporarily domiciled in county of court making appointment. Probate Code, § 1440.

#### 6. Guardian and ward ☞13(4)

A showing that minor had attained age of 14 years, had nominated father to be his guardian, preferred to live with father, and that his age was such as to require education and preparation for labor and business, in each instance established the "necessity or convenience" required for appointment of guardian. Probate Code, §§ 1408, 1440.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessity or Convenience".

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Appeal from Superior Court, Los Angeles County; Clemmence Brown, Judge pro tem.

Proceedings in the matter of the guardianship of the person and estate of Flavius O. Burket, Jr., a minor over the age of 14 years, on petition of Flavius O. Burket, Sr., contested by Gale K. McKinney, formerly Gale K. Burket. From a judgment appointing petitioner the guardian of such minor in accordance with minor's nomination, contestant appeals.

Affirmed.

R. M. Crookshank, of Santa Ana, for appellant.

Grainger & Hunt, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision here is whether the Superior Court of Los Angeles County may appoint as guardian the father of a 14-year old boy, who has been nominated by the boy, where five years before in a divorce proceeding in Orange County the custody of the boy was awarded to the mother.

By the interlocutory decree entered February, 1938, the custody of the boy was awarded to his mother, appellant herein. Provision was made for the support of the child by the father, respondent herein, and for periodic visits with him. Thereafter, in August, 1939, and in July, 1940, motions of the father for the modification of the interlocutory decree and for change of the boy's custody to respondent were heard and denied by the Superior Court of Orange County. In September, 1942, while the boy was visiting with his father in Los Angeles, the latter placed his son in a junior high school of Los Angeles, and filed his petition for appointment as guardian of the child's person and estate in the Superior Court of Los Angeles County. Following a hearing upon the petition, the court made its order appointing respondent guardian of the person only of the minor.

[1,2] Appeal is taken from the order on the grounds that the Superior Court of Los Angeles County was without jurisdiction and that there was no necessity or convenience shown for the appointment. It has long been the rule that a minor who has attained the age of 14 years has a right to select and nominate his own guardian and the court, if it approves of the nominee as a suitable person, must appoint the guardian so chosen and nominated. Sections 1405, 1406, and 1440, Probate Code; *In re Guardianship of Kerr*, 29 Cal.App.2d 439, 85 P.2d 145; *Collins v. Superior Court*, 52 Cal.App. 579, 199 P. 352; *Estate of McSwain*, 176 Cal. 287, 168 P. 117; *Estate of Meiklejohn*, 171 Cal. 247, 152 P. 734. In appointing a guardian pursuant to the cited sections of the Probate Code the court acts strictly in accordance with the special proceeding thereby authorized under the power thereby conferred. (*Ibid.*)

[3-5] Contrary to appellant's insistence that the divorce court of Orange County retained jurisdiction to dispose of the custody of the minor, it is not true that section 138, Civil Code, in any wise controls in the matter of guardianship appointments. It confers no jurisdiction for the appointment of a guardian. In the *Guardianship of Kerr*, *supra*. Its application was intended only for the protection of children in cases of divorce, whereas Section 1440, *supra*, was enacted especially to confer jurisdiction upon the Superior Court to appoint guardians for minors re-

siding, or temporarily domiciled, in the county of the court making the appointment.

[6] Appellant contends that neither necessity nor convenience was proved by respondent as a basis for his appointment as guardian. While there appears to be some doubt as to the necessity for such proof in view of the language of Section 1406 yet the facts in proof definitively establish: (a) the minor had attained the age of 14 years; (b) he had nominated respondent to be his guardian; (c) he preferred to live with his father; (d) his age was such as to require "education and preparation for labor and business." Section 1408, Probate Code. Each of the foregoing facts established the necessity or convenience of the appointment of respondent.

In support of her contention that neither convenience nor necessity was established, appellant cites *In re Hann*, 100 Cal.App. 743, 281 P. 74. No light from that case is available for the benefit of appellant. The evidence and proceedings of the trial were not before the appellate court. For that reason it was assumed that the evidence supported the decision. Also, it is observed that one of the grounds of opposition to the appointment of the nominee of Miss Hann as her guardian was "that the character of the said minor is such as to require the careful supervision of a social agency and her upbringing in a proper foster home selected thereby."

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.



58 Cal.App.2d 595

**SOLLOWAY v. WATTS.**

Civ. 13999.

District Court of Appeal, Second District,  
Division 2, California.

May 17, 1943.

#### 1. Negligence §93(3)

The statute imputing negligence of minor in operation of motor vehicle to the

parent is not limited to actions of third persons against parent but extends to actions in which the parent seeks damages, and to all cases where the rights and obligations of parents are invoked in civil actions for damages. Vehicle Code, § 352(b), St.1935, p. 145.

#### 2. Pleading §409(4)

Where complaint alleged that at time of accident involved the automobile in which plaintiff was riding was being driven by his son and evidence disclosed that son was only 20 years of age, it was not necessary to require an amendment to the answer specifically stating that son was a minor in order to invoke statute imputing minor's negligence to parent. Vehicle Code, § 352(b), St.1935, p. 145.

#### 3. Negligence §93(3), 135

Evidence that plaintiff borrowed an automobile for business trip agreeing to permit his minor son to use automobile at completion of trip and on returning a collision occurred while automobile was being driven by son, justified finding that plaintiff was still in "control" of automobile and that the son was plaintiff's "agent" at time of accident, and son's negligence imputable to plaintiff barred recovery for injuries sustained by plaintiff. Vehicle Code, § 352(b), St.1935, p. 145.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Control".

#### 4. Appeal and error §931(1)

On plaintiff's appeal from judgment for defendant in automobile collision case, evidence must be considered in the light most favorable to defendant.

#### 5. Automobiles §244(43)

Evidence that defendant's automobile was the first to enter street intersection and that plaintiff driving 25 miles per hour did not see defendant's automobile prior to collision, justified finding that plaintiff failed to yield right of way, that he did not keep proper lookout and that he entered intersection at improper speed, justifying denial of recovery. Vehicle Code, § 352(b), St.1935, p. 145, § 511(a) (4), St.1939, p. 2108 and § 550, St.1937, p. 619.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Herman Baer Solloway against Austin St. Clair Watts to recover for injuries sustained when automobile in which plaintiff was riding collided with an automobile driven by defendant. The action was tried before the court without a jury and from a judgment for defendant, plaintiff appeals.

Affirmed.

Gus Jaffe, of Long Beach, for appellant.

Nourse & Jones, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover for injuries which he suffered when the automobile in which he was riding collided with an automobile driven by defendant. The action was tried before the court without a jury and a judgment was entered in favor of defendant, from which the present appeal is prosecuted.

At the time of the accident, July 29, 1941, plaintiff was employed as a business representative for a labor union the office of which is located at 206 East Fourth Street, Long Beach. Plaintiff is a resident of Los Angeles. Before the accident he borrowed an automobile from his brother-in-law and drove from Los Angeles to Belmont Shore in Long Beach, which is the easterly extension of East Second Street. At Belmont Shore plaintiff made a business call in the interest of his union. His son, Sheldon Solloway, twenty years of age, accompanied him. When plaintiff returned to the automobile after finishing his business at Belmont Shore he found that his son, who had remained in the automobile, had taken the driver's seat. The evening before the son had requested of plaintiff permission to use the automobile to look for a job in San Pedro and it was arranged that after the completion of plaintiff's business the son might use the car on business of his own. From Belmont Shore Sheldon Solloway drove the automobile toward plaintiff's office at 206 East Fourth Street, which is on the road from Belmont Shore to San Pedro. The accident in question occurred while the automobile was being driven from Belmont Shore to plaintiff's office.

[1] It is established beyond question that at the time of the accident the automobile was being driven by the minor son of plaintiff and with the latter's permission. The trial court found that Sheldon Solloway

was guilty of negligence which contributed to the collision and plaintiff's injuries. Under the circumstances the negligence of the minor son was imputable to plaintiff and bars his recovery. Section 352 subd. (b) of the Vehicle Code, St.1935, p. 145, provides: "Any negligence or wilful misconduct of a minor whether licensed or not under this code in driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor shall be imputed to such parents or such person or guardian for all purposes of civil damages and such parents or such person or guardian shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct". The imputation of negligence to a parent is not limited to actions of third persons against the parent but it extends to actions in which the parent seeks redress and damages. The imputation extends to all cases where the rights and obligations of parents are invoked in civil actions for damages. Such was the holding in *Milgate v. Wraith*, 19 Cal.2d 297, 121 P.2d 10, where the negligence of a person using an automobile with permission of the owner was involved and where under a code provision similar to the one above quoted the obligations of the owner were determined.

[2] The court included in its findings a determination that at the time of the accident plaintiff's minor son was driving the automobile with his father's permission. It is now argued that since it was not specifically pleaded that Sheldon was a minor at the time of the accident the fact of his minority should not have been covered in the findings and that a judgment should not be based on such a finding. Plaintiff alleged in his complaint that at the time of the accident the automobile in which he was riding was being driven by his son, Sheldon Solloway. Upon the disclosure by the evidence that Sheldon Solloway was only twenty years of age it was not necessary to require an amendment to the answer specifically stating that he was a minor.

[3] The trial court also found that at the time and place of the accident plaintiff had the right to control the manner in which the automobile in which he was riding should be operated and that Sheldon was at the time of the accident the agent of plaintiff. This finding is attacked as being unsupported by the evidence. Although as



District Court of Appeal, Fourth District,  
California.

May 24, 1943.

Hearing Denied July 22, 1943.

is heretofore shown the judgment could be upheld without this finding, we are satisfied that the trial court was justified in drawing the inference that the car remained in the custody and control of plaintiff on the way from Belmont Shore to plaintiff's office. The primary use of the automobile at the time in question was to take plaintiff to Belmont Shore and thereafter to his own office. The accident occurred before the arrival at the office. It was reasonable to hold that it was the intention of plaintiff and his son that the custody of the car would be turned over to Sheldon after the arrival at plaintiff's office.

[4, 5] Plaintiff contends that the evidence is insufficient to sustain the finding that Sheldon Solloway was guilty of contributory negligence which contributed to plaintiff's injuries. The accident occurred at the corner of East Second Street and Temple Avenue. The Solloway car was being driven along East Second Street in a westerly direction and defendant's car was being driven in a northerly direction of Temple Avenue. As a motorist on East Second Street approaches Temple Street "the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of one hundred feet along all such highways, \* \* \*." Vehicle Code, § 511(a) (4), St.1939, p. 2108. Under well established principles, the evidence of the circumstances occurring at the accident must be considered in the light most favorable to defendant. Two witnesses testified that defendant's car entered the intersection before the Solloway car entered it. It was therefore the duty of the driver of the Solloway car to yield the right of way to defendant. Vehicle Code, § 550, St. 1937, p. 619. Sheldon stated that he entered the intersection at 25 miles per hour, that he did not see defendant's car before the accident and that he did not apply his brakes prior to the collision. The court could reasonably draw the inferences that Sheldon Solloway improperly failed to yield the right of way; that he did not keep a proper lookout for other vehicles in the intersection; and that he entered the intersection at an improper rate of speed. Such inferences give substantial support to a finding that Sheldon Solloway was guilty of contributory negligence.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

#### 1. Mines and minerals ☞112(3)

Plaintiffs who moved oil well drilling rig from one location to another and installed it at new location, at a time when no mining operations were being carried on, were entitled to general mechanic's lien on the equipment, even though equipment was subsequently used in drilling oil well, as against contention that there could be no general lien on improvements placed on oil property. Code Civ.Proc. § 1183.

#### 2. Appeal and error ☞1011(1)

Whether work and material furnished by plaintiffs who moved oil well drilling rig from one location to another and installed it at new location, were completed and furnished before August 15, 1940, so that notice of mechanic's lien filed November 13, 1940, was ineffective because not filed within 90 days after completion of the work, was for the trial court under conflicting evidence. Code Civ.Proc. § 1183.

#### 3. Mines and minerals ☞114½

Where plaintiffs moved oil well drilling rig from one location to another and installed it at new location, mechanic's lien to which plaintiffs were entitled covered work of dismantling rig at first location as well as other work involved. Code Civ.Proc. § 1183.

#### 4. Mines and minerals ☞117

Where facts involving notice of mechanic's lien were alleged in complaint and notice was attached as exhibit, and answer admitted the facts, but denied their legal effect, trial court was not required to find specifically that the notice of lien constituted a valid lien, and the question of effect of notice was a "question of law". Code Civ.Proc. § 1183.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

#### 5. Mines and minerals ☞114

Notice of mechanic's lien which was found to have been timely filed and which incorrectly gave range in which the property was located as 15 instead of 16 was

not so defective as to be void as between the parties, and was subject to amendment after expiration of time for filing notice, especially in view of statute providing that no error in description of property shall invalidate lien in absence of finding of intent to defraud or that error affected rights of innocent third persons, and notice was so deficient that it did not put party on further inquiry. Code Civ.Proc. §§ 1183, 1203.

#### 6. Mechanics' liens §180

A mechanic's lien may exist on an improvement without attaching to the land itself. Code Civ.Proc. § 1183.

#### 7. Mechanics' liens §180

An owner of land may by filing notice of nonresponsibility as provided by mechanic's lien statute, defeat lien against the land itself, but cannot by such notice prevent accrual of lien against an improvement in favor of one furnishing labor or materials for purpose of constructing that improvement. Code Civ.Proc. §§ 1183, 1192.

#### 8. Mines and minerals §112(3)

Plaintiffs who moved oil well drilling rig from one location to another and installed it in new location were entitled to lien on the improvement, notwithstanding that notices of nonresponsibility were filed by owner and lessee of the land, but were not entitled to lien on the oil well drilled on the land nor on the land itself nor on equipment used in drilling the well, which was not part of the improvement erected by plaintiffs. Code Civ.Proc. §§ 1183, 1192.

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Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Tom Cain and another, co-partners, doing business under the firm name and style of Cain Rig Builders, against H. L. Whiston and others, for foreclosure of a mechanic's lien. From an adverse judgment, defendants West Coast Improvement Company and another appeal.

Judgment modified and as modified affirmed.

Garnet C. Rainey and Edward D. Neuhoff, both of Los Angeles, Montgomery G. Rice, of Whittier, and Wild & Carlson, of Fresno, for appellants.

\* Dearing & Jertberg, of Fresno, and Alfred Siemon, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment decreeing foreclosure of a mechanic's lien.

On August 8, 1940, the West Coast Improvement Company leased five acres of land which it owned to E. L. Cord for the purpose of drilling for oil. On the same day, Cord entered into a written agreement with H. L. Whiston which provided that Whiston was to install a derrick and drilling rig, with the necessary material and equipment, and drill an oil well on this land. A day or two later Whiston entered into an oral agreement with the plaintiffs under which the plaintiffs agreed to move a certain derrick and drilling rig onto this property and install it for the sum of \$1,741 and to furnish certain labor and materials necessary in constructing the cement foundation work and certain pipe racks. The court found that this labor and materials were furnished and were of the reasonable value of \$419.48. The derrick and drilling rig belonged to Whiston and was then situated on other premises some twenty miles away. The removal of the same to the land in question and its installation there involved its dismantling at the place where it was situated, moving it to this land and reconstructing it there.

On August 12, 1940, West Coast Improvement Company and Cord first learned that the plaintiffs were furnishing this labor and materials. On August 14, 1940, each of them posted on the property a notice of nonresponsibility in proper form, and copies of these were recorded on August 15, 1940. On November 13, 1940, the plaintiffs recorded a notice of lien covering the labor and materials above referred to and on December 14, 1940, they recorded an amended notice of lien correcting an error in the legal description of the five acres on which the drilling rig was installed. This action followed and the defendants West Coast Improvement Company and E. L. Cord have appealed from the judgment entered in favor of the plaintiffs and decreeing, as against these defendants, that the plaintiffs have a lien upon the oil well rig and equipment and upon the oil well drilled therewith, and that the improvement be sold for the purpose of satisfying said lien.

[1] It is first contended that the complaint fails to state a cause of action because it seeks a general lien under the first paragraph of section 1183 of the Code of Civil Procedure. It is argued that there can be no general lien on improvements placed upon oil property and that the mining lien provided for in the second paragraph of section 1183 covers only labor and materials furnished in the subtractive process of actually working the mine. The complaint alleged that this derrick and rig constituted an improvement upon this real property and that the described real property is necessary for the convenient occupation and use of this improvement. The prayer was for a lien upon said improvement and upon the land or such portion thereof as was reasonably required for the convenient use and occupation of the improvement. There is no evidence that the property was acquired under the mining laws, and the prayer was for a general lien. In the absence of supporting evidence we cannot assume as against the judgment that the property was a mining claim as such property is technically known under the mining laws. At the time the labor and materials in question were furnished there was no oil well upon this property and the drilling of such a well had not been commenced. Although this improvement was later used in drilling an oil well the labor and materials were not furnished while any mining operations were being carried on. We are unable to agree with the proposition that the respondents are entitled to no relief under section 1183. The cases cited by the appellant in support of their contention, that the only way a lien can be established upon an oil well itself is through a mining lien under the provisions of the second paragraph of section 1183, are not controlling here. While the court decreed a lien also on the oil well itself there is no evidence to support that part of the judgment and it may be eliminated without affecting the other part of the judgment. In our opinion, the complaint states a cause of action and the general lien provisions of the first paragraph of section 1183 are applicable.

[2] It is contended that the first notice of lien filed on November 13, 1940, was filed more than ninety days after the completion of the work in question and was, therefore, ineffective for any purpose. In support of this contention the appellants argue that it appears from the testimony

of certain witnesses that the work in question was started on or before August 1, 1940, that certain "man days" were required for the work, and that by a mathematical computation it appears that the work must have been completed on or before August 14, 1940. The most that can be said is that there is a conflict in the evidence in this regard. The court found that the work and materials furnished by the respondents were not completed and furnished prior to August 15, 1940, and that the same were furnished and completed on or about August 26, 1940. These findings are supported by the evidence. One of the respondents testified that the agreement with Whiston for furnishing this labor and material was entered into between August 8 and August 10, that the work was started on August 10 shortly thereafter, and that it was completed on August 31. The last invoice for materials, which is dated August 26, 1940, bears upon it a notation signed by the foreman "Received in good order."

[3] The appellants urge that the evidence does not support the amount found to be due to the respondents and that the respondents forfeited all right to a lien by falsely stating the work and services performed and the amount due. It seems to be argued that everything done by the respondents was under their agreement with Whiston to be done and furnished for the flat price of \$1,741, that the actual hauling of the equipment from a location twenty miles away to the land in question was done by Whiston, that the respondents are claiming a lien for this service which they did not perform, and that they are also claiming the value of materials furnished when these were included in the contract price. Assuming, but not holding, that a part of the evidence would justify this contention the evidence, in its entirety, supports the finding made in this regard. It is further argued in this connection that the amount for which the lien was allowed included the cost of dismantling this derrick and rig on the property on which it was situated some twenty miles away, and that this is a nonlienable item since the statute only allows a lien for labor and materials furnished in connection with an improvement on the land where the improvement is erected. No cases are cited on this point and we know of no reason or principle supporting this contention. It was desired to remove a drilling rig owned by



Whiston to the land in question. This involved dismantling the rig at one point and reconstructing it after it had been moved. The reconstructed rig constituted the improvement with which we are concerned. Apparently the dismantling of the rig in the former location was either a necessary or convenient prerequisite to its reconstruction in a new location. It appears from the evidence that it was cheaper to do this than to purchase a new drilling rig. The work of dismantling was a proper part of, and contributed to, the construction of the improvement on the premises in question. We are unable to see why the cost of such a preparation of materials or articles going into the construction of an improvement is not as much a part of the furnishing and erection of an improvement as would be the cost of preparing any other materials as, for instance, in a planing mill or in a foundry. In our opinion, this part of the amount due was not a nonlienable item.

[4,5] The appellants contend that the description of the property in the notice of lien filed on November 13, 1940, was so erroneous as to make that notice of lien void and ineffective, that the error in description could not be cured by the notice of lien filed on December 14, 1940, since more than ninety days had elapsed since the completion of the work and that, therefore, no notice of lien was filed within the time required. Assuming that the amended notice of lien was ineffectual, as having been filed too late, we cannot agree that the first notice of lien filed on November 13, was so defective as to be void. That notice of lien described the property as "the oil well rig and oil well known and designated as E. L. Cord No. 1, located on the S. E.  $\frac{1}{4}$  of Section 6, Township 20 S., Range 15 E., M. D. B. & M., in Fresno County, California." The real property was correctly described in the amended notice as the E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of Section 6, Township 20 S., Range 16 E., M. D. B. & M. The original notice incorrectly gave the range as 15, instead of 16. Section 1203 of the Code of Civil Procedure provides that no error in the description of the property shall invalidate the lien unless the court finds that it was made with the intent to defraud or that it affects the rights of an innocent third party, and also finds that the notice of claim was so deficient that it did not put the party upon further inquiry. No

such findings were made by the court here, and there was no evidence to support any such findings. The appellants complain because the court did not specifically find that the notice of lien filed on November 13 constituted a valid lien. The facts were alleged in the complaint, both notices of lien being attached thereto as exhibits, and the answer filed by respondents admitted the facts but denied their legal effect. No finding was necessary, therefore, and the question of the effect of the notice of lien is one of law. The appellants argue that section 1203, Code of Civil Procedure, is inapplicable here and rely on *Bishop v. Hayward L., etc., Co.*, 19 Cal.App.2d 234, 65 P.2d 125, and *Hayward Lumber, etc., Co. v. Pride, etc., M. Co.*, 43 Cal.App.2d 146, 110 P.2d 439. In the first of these cases it was sought to quiet title to land in a certain section, whereas the claim of lien in question described land in another section and the claim of lien made no mention of the mining claims themselves. In the second of these cases the notice of lien described the property as a certain entire section and certain mining claims therein known by certain names. The complaint described the property as a particular quarter of a different section. It was held that there was there involved not merely a defective description but a case of no description whatever. In the instant case, the claim of lien first states that a lien is claimed upon the oil well rig and oil well known and designated as E. L. Cord No. 1. Section 3203 of the Public Resources Code, St.1939, p. 1118, provides that before commencing to drill a well a notice shall be filed giving the number or designation by which the well shall be known. No evidence was introduced at the trial tending to show that the appellants were in any way deceived or that the rights of any third party were involved. As between these parties, and under the circumstances which here appear, we think the description in the notice of lien filed on November 13, 1940, was not so defective as to be entirely void and that the error appearing therein was not sufficient to invalidate the lien, especially in view of the provisions of section 1203.

[6-8] It is further argued that the notices of nonresponsibility posted and filed by the appellants, respectively, are a complete bar to any claim of lien upon the part of the respondents. We think the principles laid down in *English v. Olympic Audi-*

torium, Inc., 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281, are applicable here and furnish a complete answer to this contention. That case is factually quite similar to the instant case and the fact that here the lessee had not been dispossessed is immaterial, and the further fact that in the instant case the lease provided that the lessee might at any time remove the improvements from the property makes all the more applicable the rules announced in the case mentioned. It was there held that under the code provisions and the constitution a mechanic's lien may exist on an improvement without attaching to the land itself. It was further held, in effect, that by filing a notice of nonresponsibility, as provided for in section 1192, Code of Civil Procedure, the owner of the land or of an interest therein may defeat the lien as against the land itself or as against his interest in the land, but that he cannot, by such notice of nonresponsibility, prevent the accrual of a lien against the improvement itself in favor of one furnishing labor or materials for the purpose of constructing that improvement. We think those principles are applicable here and that these respondents are entitled to a lien, notwithstanding the notices of nonresponsibility which were filed, upon the improvement to which they contributed by the labor and materials here in question. It appears, however, that the lien as recognized and enforced by the judgment goes farther than that to which the respondents are entitled. In the judgment it is provided that the respondents have a lien "upon that certain oil well rig consisting of cement foundations, steel derrick, pipe rack, walks, and all rig accessories and equipment together with that certain oil well drilled and constructed with said rig upon" the real property here involved. Under the holding in *English v. Olympic Auditorium, Inc.*, supra, the respondents were not entitled to a lien upon this oil well itself nor upon the real property involved because of the filing of notice of nonresponsibility, but they were entitled to a lien upon that part of the improvement, to which they had contributed labor and materials, which was above the surface of the ground. The portion of the judgment enforcing a lien upon the oil well itself should be stricken. The judgment also enforced a lien upon "all rig accessories and equipment", being a part of this oil well rig. This is erroneous as it includes, or may include, articles and equipment used in the drilling of this

oil well which were not a part of the improvement erected by the respondents and in connection with which they had nothing to do. These are severable parts of the judgment which may be eliminated without affecting the lien to which the respondents are entitled upon the improvement to which they contributed labor and materials.

Other questions raised by the appellants require no consideration in view of what we have said on the matters herein discussed. That part of the judgment last above quoted is modified by striking therefrom the words "cement foundations" and the words "and all rig accessories and equipment together with that certain oil well drilled and constructed with said rig." As so modified, the judgment is affirmed. Each party to pay his own costs on appeal.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 696

**TAFF v. ATLAS ASSUR. CO., Limited, et al.**  
Civ. 13973.

District Court, Second District,  
Division 2, California.

May 21, 1943.

Hearing Denied July 19, 1943.

#### 1. Reformation of Instruments ☞45(2)

In order to justify decree revising written contract for mistake, the facts must be proved by clear and convincing evidence and a preponderance of evidence is insufficient. Civ.Code, § 1577.

#### 2. Appeal and error ☞1009(3)

Decision of trial court, on conflict of evidence regarding whether mistake has been proven by clear and convincing evidence so as to authorize revision of written contract, is conclusive on reviewing court.

#### 3. Evidence ☞588

In case of conflict of evidence, trial court is under no inhibition to accept or reject testimony of either side and is governed solely by conscientious and zealous purpose of the judge to ascertain the truth, and to record the facts as he may determine.

**4. Reformation of Instruments**  $\S$  45(14)

In action for reformation of policy covering jewelry, to eliminate provision excluding liability for loss occurring while jewelry was in automobile unattended by regular employee of insured, and for recovery for loss of jewelry when it was left in unguarded automobile, evidence sustained judgment for insurer on ground that provision sought to be eliminated was not inserted as result of mutual mistake, mistake of insured known to or suspected by insurer, or fraud of the insurer. Civ.Code,  $\S$  1577.

**5. Insurance**  $\S$  143(8)

The mere failure to read insurance policy does not in itself necessarily prohibit revision of the insurance contract on ground of mistake, but such failure is a circumstance to be considered with other circumstances such as insured's experience and intelligence, in determining question of insured's negligence. Civ.Code,  $\S$  1577.

**6. Reformation of Instruments**  $\S$  45(2)

A contract having been deliberately executed is presumed correctly to express intention of the parties and burden of overcoming presumption rests on him who seeks to avoid its plain terms by clear and convincing evidence.

**7. Insurance**  $\S$  143(8)

Reformation of an insurance policy on ground of mistake without exercise of reasonable care on part of the insured is not to be encouraged. Civ.Code,  $\S$  1577.

**8. Insurance**  $\S$  143(8)

In order for insured to be relieved of result of his failure to read policy, insured must have exercised that degree of care ordinarily exercised by a reasonably prudent person under the same circumstances. Civ.Code,  $\S$  1577.

**9. Insurance**  $\S$  136(5)

Generally, receipt of insurance policy and acceptance thereof by insured without objection binds insured as well as insurer, and insured cannot thereafter complain that he did not read policy or know of its terms. Civ.Code,  $\S$  1577.

**10. Insurance**  $\S$  136(5)

Where insured accepted and retained five successive policies covering loss of jewelry, identical in their conditions and restrictions, insured was bound by terms of policy, and, in suit to reform policy to eliminate provision which excluded liability

for loss which occurred while jewelry was in unguarded automobile, on ground of mistake or fraud, insured could not contend that he had not read the policy. Civ.Code,  $\S$  1577.

**11. Reformation of Instruments**  $\S$  36(3)

Mere failure to issue policy requested by insured does not necessarily constitute "fraud" or actionable "mistake", and it must be alleged that insurer knew or should have known that insured would not examine policy, or that insurer took affirmative action to prevent such examination. Civ. Code,  $\S$  1577.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud" and "Mistake".

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Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by A. D. Taff against the Atlas Assurance Company, Limited and others, for reformation of an insurance policy covering jewelry, and for recovery thereon. From an adverse judgment, plaintiff appeals.

Affirmed.

William M. Samuels and Jack R. Kates, both of Los Angeles, for plaintiff and appellant.

Chase, Barnes & Chase, of Los Angeles. By Daniel P. Bryant, of Los Angeles, for defendants and respondents.

MOORE, Presiding Justice.

Plaintiff appeals from an adverse judgment upon his action for the revision of an insurance policy and for a recovery thereon. The complaint contains three counts respectively: (1) Mutual mistake of the parties; (2) the mistake of plaintiff known to or suspected by defendant; and (3) the fraud of defendant. The particular feature of the policy which plaintiff sought to eliminate was a restriction upon the coverage contained in item I of the exclusion clauses which reads as follows: "Loss of or damage to property insured hereunder whilst in or upon any automobile, motor cycle, or any other vehicles unless, at the time the loss occurs, there is actually in or upon such vehicle, the assured or a permanent employee of the assured or a person whose sole duty it is to attend the vehicle; this exclusion shall not apply to property in the custody of a common carrier covered



hereunder, or in the custody of the post office department as first class registered mail." Preceding the exclusion clauses the policy contained the following: "This policy covers loss of and or damage to the above designated property or any part thereof arising from any cause whatsoever except as hereinafter mentioned, viz.:"

The answer denied that the policy failed to conform with the agreement for the purchase of the policy; denied that there was any mistake or fraud.

He made an application through R. A. Rowan and Company as agents for defendant Atlas Assurance Company Limited, hereinafter referred to as Atlas, for a "Jeweler's Block Policy," in the amount of \$10,000. He was definite and positive as to the particular type of policy preferred. He was told by the agents that the policy he asked for afforded the broadest coverage available and at a lesser premium than the interior and messenger holdup policy and that it was designed to take care of the custom of the jeweler's trade. Such policy was issued to him effective as of January 1, 1937. It was renewed annually till 1941. Having suffered a loss in May of the latter year, upon the rejection of his claim in the sum of \$10,000, he instituted this action for reformation and for the amount of his damage. He based his action upon the claim that he purchased his policy by reason of his reliance upon the statements of the agents of the insurer that the Jeweler's Block Policy would afford him protection "under any and all circumstances." Such, also, was his testimony. The agents who had at first dealt with him testified that no request was made for an all-inclusive coverage.

The court found in accordance with the evidence offered by defendants and the proof abundantly supports the finding. In plaintiff's written application for his first policy which became effective January 1, 1937, he stated that when traveling, his merchandise was carried in a special grip and when in strange cities it was put in the safe-deposit vaults of hotels. In subsequent renewals of his policy the same statement appeared in his applications. He testified that there was nothing to prevent his reading any of the five policies received from Atlas; that it was the duty of his secretary to examine the policy; that she is a part of his business; that he did not do anything without her. Moreover, on the face of the first policy, issued January 1,

1937, there was stamped the following: "The assured is requested to read his policy and if incorrect to return it immediately for alteration." Each year he received the same type of policy—identical in every respect except as to the date and term. Each and all of the five policies contained the same exclusion clauses A to M, including I, quoted above. When he applied for the policy he had been a jeweler for 18 years at first in New York City, later in Los Angeles. It will thus be seen that plaintiff, a business man of long experience received what he ordered; had it renewed four times; had in his possession five successive identical policies on the front page of each of which was the exclusion clause "I". During the five years mentioned he never once returned a policy for correction. He did not say at his first conference with the agents that he desired coverage for negligence in leaving his sample case in his automobile unattended. The court below found that there was no mutual mistake of the parties and that defendants did not suspect that plaintiff was under the misapprehension that his coverage would include loss under any circumstance; also that there was no fraud. Despite such findings, plaintiff contends that the court committed error in its ultimate determination of the facts. In other words we are to determine whether the evidence supports the findings of the trial court.

[1,2] (1) In order to justify a decree revising a written contract for mistake, the facts necessarily must be proved by clear and convincing evidence. A preponderance is insufficient. Restatement of Law of Contracts, sec. 511. Although a court may reform a written instrument on the ground of mistake, yet the proof of such mistake must be clear, convincing, and satisfactory to the court. The decision of the trial court upon a conflict of evidence with reference to such mistake is conclusive upon the appellate court. *Sullivan v. Moorhead*, 99 Cal. 157, 33 P. 796; *Oakdale Mercantile Co. v. Baer*, 128 Cal.App. 350, 17 P.2d 779.

The authorities cited by plaintiff (*Wilson v. Moriarty*, 88 Cal. 207, 26 P. 85; *Clegghorn v. Zumwalt*, 83 Cal. 155, 23 P. 294; *Higgins v. Parsons*, 65 Cal. 280, 3 P. 881) are not in point. In the *Wilson* case, plaintiff was a woman unable to read or write. In the *Clegghorn* case it was the admitted mistake on the part of both parties. In the *Higgins* case it was found that the

defendant knew that the writing did not contain the stipulation at first agreed upon, to wit: That defendant should pay interest at the rate of 1 per cent a month, but that he knew that it contained a provision that he should pay interest at the rate of 1 per cent per annum. Emphatically, such authorities do not support plaintiff's contention. His business was one of intense competition, and he was seeking insurance of a specific kind having to do with his particular trade. It will thus be seen that the character and experience of plaintiff afforded the trial court additional support for its determination that the plaintiff was not the victim of fraudulent representations. If he had in mind a policy that would insure his jewelry under any conceivable situation, a business man of ordinary prudence surely would at some time within five years look to see whether he was secure in such coverage.

[3, 4] In his zeal to upset the findings of the trial court, plaintiff has placed no value upon the testimony offered on behalf of defendants which was the basis of the court's findings. In case of a mere conflict of evidence the trial court is under no inhibition to accept or reject the testimony of either side. It is governed solely by the conscientious and zealous purpose of the judge to ascertain the truth and to record the facts as he may determine. Moreover, even though it had been established by the evidence that all parties understood that plaintiff was seeking insurance that would protect him while traveling by automobile, to points remote from Los Angeles, the trial court was not for that reason required to find that the understanding was that the policy would extend to a situation where plaintiff might leave his jewelry case in his unguarded automobile contrary to his practice as declared in his repetitious application, namely, that he carried his jewelry in a special grip and left it in safe-deposit vaults at night.

In support of his claim that he was the victim of a fraud perpetrated by defendants, plaintiff cites: *Glickman v. New York Life Ins. Co.*, 16 Cal.2d 626, 107 P.2d 252, 131 A.L.R. 1292; *Golden Gate Motor Transport Co. v. Great American Indemnity Co.*, 6 Cal.2d 439, 58 P.2d 374. These authorities are not apropos. The agent of the New York Life gave advice to Glickman who was disabled and unable to pay premiums past due. It was held that the agent was under a duty to make no mis-

leading statements with reference to the continuance of a policy. In the second case the Motor Transport Company having sold a Hudson Sedan to one Paul Colburn requested that the Colburn car be included in a nonownership policy. Such request was emphasized to the agent who sold the policy which did contain Colburn's name. There was no written application. The holding of that case in substance is: Where the parties first agree with reference to the coverage of a particular chattel and the premium is paid for such coverage, the insurer is held bound to give the protection contracted for, notwithstanding the failure of the insurer to include in the policy issued a description of such covered chattel. The finding of the trial court was supported by the evidence.

Plaintiff sought the greatest amount of protection for his merchandise. If he should not leave his jewelry in his unguarded car exposed to the hazards of theft, accident and fire, his coverage was complete; but if not, he had got what he bought. There was no reason why defendants should suspect plaintiff to be ignorant of the "I" clause. Its presence was the correlative of his declaration as to the manner of caring for his attractive property. The insurer was not required to furnish absolute coverage because plaintiff's application did not suggest it. Neither did he make request for it at the first conference as the court below determined.

(2) But whatever may be said as to the testimony with reference to plaintiff's expressed wishes at his first conference with the agents, he received his policy which became effective January 1, 1937, and presumably was satisfied with its coverage. Not only did ordinary prudence require that he examine it to see that it was the policy he had intended to purchase, but in bold letters on the very face of it he was admonished to read and return it for correction. The exclusion clause which he now desires to have stricken because he did not know that it was in the first policy appeared on the front page in bold type. A casual reading would have detected it then or on his receipt of any of his policies for the four succeeding years.

[5-10] While the mere failure to read a policy does not in itself necessarily prohibit a revision of the contract, yet such failure on the part of the policy holder is a circumstance to be considered by the court on the question of his negligence.

So, also are the experience and intelligence of plaintiff factors to prove his neglect. Unless the policy holder making such excuse gives a satisfactory explanation of his failure to read it, the trial court may be justified in rejecting his excuse and in denying the reformation. The court is not bound to accept just any excuse offered by the holder of a policy seeking a reformation of its provisions for his failure to read it at the time he received it. *California Trust Co. v. Cohn*, 9 Cal.App.2d 33, 48 P.2d 744. A contract having been deliberately executed is presumed correctly to express the intention of the parties. *Welk v. Conner*, 102 Cal.App. 286, 289, 282 P. 963. The burden of overcoming such presumption rests upon him who seeks to avoid its plain terms by clear and convincing evidence. *California Trust Co. v. Cohn*, supra, 9 Cal.App.2d page 40, 48 P.2d 744. The reformation of a policy on the ground of mistake without the exercise of reasonable care on the part of the insured is not to be encouraged. *Fraters Glass & Paint Company v. Southwestern Construction Company*, 107 Cal.App. 1, 5, 290 P. 45. In order to be relieved of the result of his failure to read his policy the insured must have exercised that degree of care ordinarily exercised by a reasonably prudent person under the same circumstances. Otherwise equity will not relieve against it. 4 R.C.L. 507, sec. 20. If the trial court should determine that the excuse offered by the insured is not a satisfactory explanation of his failure to read the policy, he is not relieved from the consequences of his neglect of a legal duty within the meaning of section 1577 of the Civil Code. *Nelson v. Meadville*, 19 Cal.App.2d 68, 70, 64 P.2d 1116. It is a general rule that the receipt of a policy and its acceptance by the insured without an objection binds the insured as well as the insurer and he cannot thereafter complain that he did not read it or know its terms. It is a duty of the insured to read his policy. 14 Cal.Jur. 427. By accepting and retaining five successive policies insuring against loss or damage to merchandise, identical in their conditions and restrictions, the policy holder is bound by its terms and in a suit for its reformation his plea that he did not read it is unavailing. *Kahn v. Royal Indemnity Co.*, 39 Cal.App. 180, 178 P. 331; *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 206, 142 P. 51.

[11] Where the insured alleges as a fact that the defendant did not issue a policy covering the particular risk which

he claims to have specified, he must in an action for revision allege more than the neglect of the insurer to cover such risk and his own demand for such coverage. If the insurer does not grant the coverage applied for, the insured may reject the policy. However, the mere failure to issue the policy requested does not necessarily constitute fraud or actionable mistake. It must be alleged that defendant knew or should have known that plaintiff would not examine the policy or that defendant took affirmative action to prevent such examination. *Bank of Fruitvale v. Fidelity & Casualty Co.*, 35 Cal.App. 666, 670, 170 P. 852.

Affirmed.

W. J. WOOD, and McCOMB, JJ., concur.



58 Cal.App.2d 657  
**BONACCI v. MASSACHUSETTS BONDING & INSURANCE CO.**  
Civ. 12323.

District Court of Appeal, First District,  
Division 1, California.

May 21, 1943.

#### 1. Insurance ⇨665(7)

In action for disability benefits under insurance policy, evidence supported finding that releases were secured by fraud, so as to void releases.

#### 2. Insurance ⇨579

Where releases of disability benefits under insurance policy were secured by fraud in the inception, the releases were "void ab initio" and need not be formally rescinded as a prerequisite to avoiding the releases.

See Words and Phrases, Permanent Edition, for all other definitions of "Void Ab Initio".

#### 3. Release ⇨24(2)

Where a release is signed through "fraud in the inducement" the fraud renders the release voidable and to avoid the release an offer to rescind and restore the consideration is necessary but where a



release is signed through "fraud in the inception", the writing is void ab initio and need not be formally rescinded as a prerequisite to avoiding release.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud in the Inception" and "Fraud in the Inducement".

#### 4. Insurance ⇨558(1)

Where insured discontinued filing monthly disability notices with insurer as required by policy after releases were secured by fraud, notice requirement as "condition" of recovery of disability benefits was excused.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition".

#### 5. Insurance ⇨547

Under rule that a provision requiring notice to insurer must be strictly construed against insurer, fact that insured in required monthly report reported gall bladder infection as cause of disability, without mentioning arthritis, was not a failure to perform "conditions" of policy so as to preclude recovery of disability benefits thereunder, where arthritis was merely a continuation of gall bladder infection.

#### 6. Insurance ⇨665(5)

In action for disability benefits under insurance policy, evidence sustained finding that disabling effects of arthritis existed prior to cancellation of policy so as to permit recovery.

#### 7. Insurance ⇨615

Where insured, discovering in November, 1938, that he had executed fraudulent releases of disability benefits due under policy on July 2, 1937, brought suit in September, 1940, suit was not barred by "laches", where prejudice to insurer in being deprived of opportunity to make physical examinations was result of insurer's fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

#### 8. Appeal and error ⇨1073(1)

Where insurance policy was cancelled except as to then existing disabilities, and suit brought to recover for a then existing disability, a judgment "that the insurance policy sued upon is hereby declared to be in full force and effect" was not prejudicial in that phrase only meant that policy was

still in effect with respect to insurer's obligation to pay under the existing disability provision.

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Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Frank Bonacci against Massachusetts Bonding & Insurance Company to compel payment of disability benefits under insurance policy, and cross-complaint by defendant praying for delivery of policy to it for cancellation. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

H. W. Glensor, of San Francisco, for appellant.

Healey & Taylor, of Martinez, for respondent.

PETERS, Presiding Justice.

Defendant insurance company appeals from a judgment rendered in an action brought by plaintiff to compel payment of certain disability benefits alleged to be due under the terms of an insurance policy issued to plaintiff. The court determined that there was due to plaintiff \$25 a month from August 2, 1937, to the date of the judgment, May 12, 1942. It held that the policy was in full force and effect and that there was due in past payments the sum of \$1,450.

The policy here involved was issued in 1924. Admittedly, all premiums were paid up to the premium due in December, 1936. No premiums have been paid since that date. Under the terms of the policy defendant, among other things, agreed to insure plaintiff against "Disability resulting from illness which is contracted and begins during the life of this policy \* \* \*." For disability which prevented the insured from performing the duties of any business or occupation the company agreed to pay \$100 per month for twelve months, plus an additional \$200 if the insured was hospitalized; further, if the disability continued beyond the twelve-month-period, the company agreed to pay the insured \$25 a month for as long as the disability continued. It was provided that such additional payments would be made while the insured was "under the regular treatment of a legally qualified physician or surgeon." The policy contained a clause that "Strict compliance on the part of the insured and beneficiary with all of the terms and conditions of the

policy shall be a condition precedent to recovery," and another clause that if any disability continued beyond thirty days the insured had to furnish the company, every thirty days, if reasonably possible to do so, a written report of the insured's attending physician, fully stating the condition of the insured. The policy also provided that written notice of the injury or sickness upon which the claimed disability was predicated must be given the company within twenty days of the accident causing the injury or within ten days of the disability resulting from sickness. The company was given the right to make its own medical examination of the insured whenever reasonably required.

It is admitted that plaintiff became disabled within the meaning of the policy in June, 1936. At that time he was sixty-eight years of age and was working for a railroad company in Nevada as a section foreman, a position he had occupied for many years. He was sent to a hospital in Salt Lake City where his illness was diagnosed as an infected gall bladder and gall stones, and where he remained until the middle of July, 1936. He was then removed to a hospital in Los Angeles where he was operated upon for gall stones. He remained in that hospital for three months and then was sent to a rest home in Los Angeles. The first operation did not clear up the condition, and in February, 1937, he was again sent to a Los Angeles hospital where he was again operated upon and his gall bladder removed. After a month at the hospital he was sent back to the rest home, where he remained until July, 1937. During the period June, 1936, to July, 1937, pursuant to the requirements of the policy, plaintiff's attending physicians, every thirty days, filed the required medical reports with the company on forms furnished by the company. All these statements declared that plaintiff was disabled because of the gall bladder condition. No other disease was mentioned in the various reports.

In the period July of 1936 to June, 1937, the company paid to plaintiff eleven payments of \$100 and the \$200 hospital indemnity called for by the policy. The twelfth payment was due prior to July 2, 1937. Plaintiff testified that this payment was not paid when due, and that he telephoned Mr. Doyle, claims adjuster for defendant and the person who had signed all the prior checks, and with whom all negotiations relating to the policy had been carried on.

Doyle had visited plaintiff at the hospital and rest home on several occasions during the year in question and was well acquainted with plaintiff's condition. Doyle requested plaintiff to call at the company's office in Los Angeles. Plaintiff called upon Doyle on July 2, 1937. Doyle told plaintiff that all that he had due under the policy was \$100 for June, 1937, and that otherwise all rights under the policy were exhausted. He also stated that the company would make a gift of an extra \$25 to plaintiff. The evidence shows that plaintiff is a foreigner and that he is unable to read or write English except to a very limited extent. He had never read his policy and did not know of the \$25 a month provision. Doyle prepared, and had plaintiff sign, several documents which provided, generally, that for the \$125 payment plaintiff agreed to and did generally release the company from all obligations under the policy. Doyle, in addition, prepared a draft for \$125 which expressly provided that it was payable only when the policy was attached thereto. The policy was then at the home of plaintiff's daughter in Crockett, California. Plaintiff testified that Doyle suggested that he cash the draft at once, and that Doyle, in his presence, telephoned the bank immediately after the releases were executed and arranged to have the draft cashed without the necessity of producing the policy. Plaintiff cashed the draft in accordance with this arrangement. Although contradicted by Doyle, plaintiff testified that Doyle told him that he had to sign the documents prepared by Doyle to secure the last \$100 payment, that the documents were merely receipts for this last payment, and that Doyle was throwing in the extra \$25 as a gratuity.

Nothing more was done until November, 1938. In that month plaintiff discovered the policy in a trunk and it was read by plaintiff's daughter, with whom he was living, and others. They discovered the clause providing for the \$25 payment during the total period of disability. In that month plaintiff and his daughter complained to the insurance commissioner that the \$25 payments had never been made. The commissioner communicated with defendant, and by reply, dated November 17, 1938, defendant declared that all payments had been made, and that plaintiff had executed a complete release. A copy of this letter was sent by the commission to plaintiff's daughter and by her communi-

cated to plaintiff. The complaint forming the basis of the present action was filed in September, 1940.

The complaint alleged that in 1936 plaintiff became totally and permanently disabled and that he has been disabled ever since. He also alleged due payment of all premiums and performance of all conditions on his part to be performed. Defendant denied that plaintiff paid any premiums after December 24, 1936, and that is now admitted. Defendant denied the performance of the policy conditions by plaintiff, denied he was disabled within the meaning of the policy, affirmatively alleged failure to comply with the condition requiring medical statements every thirty days after June of 1937, and as a special defense pleaded the releases of July 2, 1937. By way of cross complaint defendant prayed that the policy be delivered to it for cancellation. Plaintiff, in his answer to the cross complaint, in appropriate manner, pleaded that the releases were secured by the fraud of defendant.

The case proceeded to trial in March, 1941. At that time plaintiff produced evidence that the releases had been secured by fraud, and also produced his attending physician Dr. Eldridge. The doctor testified he saw plaintiff after his first operation about July, 1936, but did not see him professionally again until September, 1937. He testified that plaintiff had no physical evidence of arthritis in July, 1936, but that when he saw him in September, 1937, he was totally incapacitated from that disease; that since September, 1937, he has constantly attended plaintiff; and that since that time he has been totally incapacitated from arthritis. He gave it as his opinion that the condition he found in September of 1937 was of long standing, and existed in 1936. At the conclusion of this first hearing the trial court held that plaintiff was not bound by the releases for the reason that they were procured by fraud, and ordered the case continued to enable the plaintiff to make proof that he was disabled by arthritis during the life of the policy. Further hearings were had in March and April, 1942. Plaintiff, at these hearings offered evidence of his doctor, his nurse and his sister to the effect that although he was disabled from the gall bladder condition in the last part of 1936, he was also disabled with arthritis during this period. Admittedly the various doctors' reports filed between July, 1936, and June, 1937, gave the gall bladder condition as the cause

of disability and none mentioned arthritis as a contributing cause of disability. Dr. Eldridge testified that the arthritic condition that he first observed in September, 1937, was then fully developed, and that the arthritis was caused by the gall bladder infection.

On this evidence the trial court found that during 1936 plaintiff became disabled within the meaning of the policy by reason of the gall bladder infection and arthritis; that since that date he has remained disabled; that plaintiff had duly performed all the conditions required under the policy; that he had given to defendant all notices required by the policy; and that the releases were secured by fraud. On these findings the trial court adjudged that plaintiff was entitled to \$25 a month from August 2, 1937, one month after the date of the releases, to the date of the judgment, and also determined that the policy was "in full force and effect."

[1] Appellant urges that the finding of fraud is unsupported by the evidence. But little consideration need be given to this contention. The evidence clearly supports the finding. The evidence shows that respondent was practically illiterate. His testimony was that Doyle told him that all he had coming under the policy was the last \$100, and that the documents were receipts. These statements were false. Doyle admitted that on July 2, 1937, respondent was totally disabled within the meaning of the policy, and he admitted that respondent did not then tell him that the doctor had told him he could go back to work. Later he changed that story and testified that respondent had told him he was going back to work sometime in the future. Respondent denied so stating, and pointed out that at that time he had been retired by law and could not have resumed the only job he knew, working for the railroad. Nevertheless, Doyle, in drawing up the release, inserted a false statement for respondent to sign to the effect that he had "just been informed by my doctor that I am to be released by him for duty August 1, 1937." Respondent testified that at this time he was so crippled by arthritis he could not close his hands or raise his arms. He testified that Doyle represented that the documents were mere receipts and had to be signed to secure the money then due him, that at that time he did not know of the \$25 disability clause in the policy, and that Doyle told him that he was only en-



titled to a balance of \$100 under the policy. There was conflicting evidence on this issue offered by appellant, it is true, but these conflicts have been resolved by the trial court. Appellant's contention that respondent's evidence is inherently improbable deserves no consideration. A reading of the record demonstrates that respondent told a coherent credible story with far less contradictions and improbabilities than appeared in the testimony of Doyle. These conflicts were for the trial court. Its finding on the issue of fraud is clearly supported and cannot be disturbed.

[2,3] Appellant next urges that, according to the terms of the releases, respondent was paid \$25 not then due as consideration for their execution, and contends that, so long as respondent stands on fraud in procuring the releases, it was incumbent upon him to rescind the releases and restore or offer to restore the consideration received by him before he could lawfully maintain this action to avoid the releases. In this connection such cases as *Winstanley v. Ackerman*, 110 Cal.App. 641, 294 P. 449, and *Garcia v. California Truck Co.*, 183 Cal. 767, 192 P. 708, are cited. In those cases the plaintiffs received \$1,250 and \$350 respectively as consideration for the execution of releases. In both cases the plaintiffs knew they were signing releases, but were relying upon fraud to avoid them. In such circumstances an offer to restore the consideration received was properly held to be a condition precedent to maintaining the action. But that is not the situation here. In this case the fraud was not in securing the respondent's signature to a document the nature of which was known to him, but in misrepresenting the nature of the document. Plaintiff testified, and the trial court found, that he believed, because of appellant's fraud, that he was signing a mere receipt. There is a fundamental distinction between a case predicated on fraud in the inducement, and a case based upon fraud in the inception. In the former case the fraud renders the contract voidable, and to avoid it an offer to rescind is necessary. In the case of fraud in the inception (which is the present case) the writing is void ab initio, and need not be formally rescinded as a prerequisite to a right of avoidance. *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 P. 1053; *Raynale v. Yellow Cab Co.*, 115 Cal.App. 90, 300 P. 991; *Wagner v. McManus*, 2 Cal.App.2d 544, 38 P.2d 204, *Restatement, Contracts*, § 479.

[4-6] Appellant next urges that the findings that respondent performed all conditions required by the policy, and that the arthritis existed before December, 1936, are unsupported. It is admitted that respondent gave the notice required by the policy in July, 1936, at the inception of the gall bladder disability. It is admitted that during the twelve months, July of 1936 to June of 1937, monthly disability notices prepared by respondent's doctors were filed with the company as required by the policy. It is conceded by respondent that none of these reports stated that respondent was suffering from arthritis. Obviously, notices after July of 1937 were excused because of the fraud of appellant. While it is true that respondent at no time filed a notice specifically referring to the arthritic condition, such notice was not indispensable. According to the medical evidence produced by respondent the arthritic condition was caused by, was co-existent with, and related back to the original gall bladder infection. In other words, the arthritic condition was not a separate and distinct disability. It is not a case where respondent was disabled by the gall bladder condition, and then later disabled by arthritis. According to the evidence most favorable to respondent the arthritic condition was merely a continuation of the gall bladder condition. It was a manifestation and direct outgrowth, another symptom of the same diseased condition. Keeping in mind the rule that the provision requiring notice must be strictly construed against appellant, it seems quite clear that notice of the infection to the gall bladder included notice of all manifestations of that disease, including notice of the arthritis. This interpretation of the evidence, which was the interpretation placed upon it by the trial court, serves to distinguish this case from *Davern v. Travelers' Equitable Ins. Co.*, 172 Minn. 19, 214 N.W. 468 and *Dullum v. Northern Life Ins. Co., Or.*, 127 P.2d 749, and similar cases. In those cases, though suffering from some sickness or injury during the life of the policy which ultimately resulted in disability, the disability did not occur until after the policies were canceled. It was held that the insured was not entitled to disability benefits. But in the instant case the respondent became disabled within the meaning of the policy in June, 1936, during the life of the policy. Required notices were given. That disability, without a break in the time element, was continuous up to the time of

trial. That disability consisted of an infection which first affected the gall bladder, and then resulted in arthritis. The finding of the court is that "during the year 1936 \* \* \* while said policy was in full force and effect, plaintiff, by reason of illness and disease, to wit: gall bladder infection and a chronic arthritic condition, became totally disabled" and has remained disabled. Under the interpretation of the evidence above given it is immaterial whether or not the arthritic condition existed prior to December of 1936 when the policy was canceled. The infection which caused the gall bladder condition and the arthritis admittedly existed prior to that date, and the company had full notice of this infection. However, it should be mentioned that, although respondent told his doctor that the arthritis did not appear until after the February, 1937, operation, there is ample evidence that the crippling and disabling effects of that disease had appeared prior to December, 1936. Dr. Eldridge testified that the arthritic condition he observed in September, 1937, had existed a long time and in his opinion had existed in 1936. Respondent's daughter testified that in November, 1936, her father's hands and arms were so crippled that he could not put on or take off his coat, and that he could not close his hands. Miss Jolly, one of respondent's nurses at the rest home, testified that in that period respondent's hands were no use to him, that he could not dress or undress himself, and that he could not cut his food.

[7] Appellant makes some point of the fact that respondent discovered the clause relating to the \$25 payment in November, 1938, and was informed by the insurance commissioner in that month of the fact that the documents that had been signed on July 2, 1937, were releases, but did not file suit until September, 1940. No contention is or can be made that the cause of action was barred by the statute of limitations, but it is urged that respondent was guilty of laches, and that appellant has been prejudiced by respondent's failure to rescind or sue promptly. As already pointed out, no formal rescission was necessary. The prejudice alleged to exist is that because of the delay appellant was deprived of the opportunity of making periodic physical examinations of respondent. The obvious answer to this contention is that the reason appellant was deprived of this opportunity was that it fraudulently secured the re-

leases in July of 1937. In view of the finding of fraud, amply supported by the record, appellant is in no position to successfully urge laches against the defrauded respondent.

[8] The last point urged is that the judgment is too broad and prejudicially erroneous in that it decrees "that the Insurance Policy sued upon \* \* \* is hereby declared to be in full force and effect." Appellant seems to fear that if respondent should recover from the present disability and then suffer a new disability he would be entitled, under this judgment, to new disability benefits although the policy, except as to the then existing disability, was canceled in December, 1936. Appellant's fears on this point are unfounded. All that the court adjudicated by the challenged phrase was that the policy is still in force and effect so far as appellant's obligation to pay \$25 a month to respondent is concerned under the existing disability. So interpreted, appellant is in no way prejudiced by this portion of the judgment.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



58 Cal.App.2d 720

**CULJAK et al. v. BETTER BUILT  
HOMES, Inc.**

Civ. 13996.

District Court of Appeal, Second District,  
Division 2, California.

May 21, 1943.

Rehearing Denied June 18, 1943.

Hearing Denied July 19, 1943.

#### **1. Work and labor ☞24(1)**

In action by contractor on verbal contract to construct a sewer for the cost of construction, plus 25 per cent thereof, allegation and proof of reasonable value of labor and materials used in construction of the sewer was essential.

#### **2. Trial ☞395(5)**

The function of "findings" is to declare only the ultimate fact determined,

and the trial court is not required to incorporate evidentiary facts in its findings.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding".

### 3. Appeal and error ⇨1071(1)

Where appellant's brief stated that items used to construct a sewer and costs thereof were in evidence and aggregate amount of such items was identical with amount found due to contractor under cost plus contract, items so proved were assumed to have established the basis of the computation, and hence finding of amount due contractor was not prejudicial because of failure to show the calculations by which judgment was arrived at.

### 4. Work and labor ⇨30(4)

Finding that the parties first agreed in writing to construct a sewer and that such written contract was modified by supplemental writings relating to additional requirements and costs of extra work and equipment was not inconsistent with finding that prior to performance of the contract, the parties orally agreed to do the same construction under the same terms contained in the original contract and its supplements, so as to preclude contractor's recovery on the original contract and its supplements.

### 5. Appeal and error ⇨1071(1)

If findings are not incapable of being harmoniously construed, the judgment may not be set aside.

### 6. Appeal and error ⇨1071(1)

Any finding against defendant inconsistent with defendant's verbal agreement to pay contractor the cost and a specified percentage thereof for construction of a sewer was harmless, where there was no finding inconsistent with that of defendant's obligation to pay the reasonable cost of construction of the sewer and the evidence supported each finding made.

### 7. Appeal and error ⇨1170(1)

Where entire record did not disclose a miscarriage of justice, judgment for plaintiff could not be disturbed. Const. art. 6, § 4½.

### 8. Appeal and error ⇨1071(1)

To justify reversal of a judgment because of defective findings, it must affirmatively appear that substantial injury has been caused, that substantial rights have been affected and that a different result

would have been probable if the defect had not occurred.

### 9. Appeal and error ⇨1170(1)

The statute prohibiting reversal of judgments unless the error was prejudicial causing substantial injury to the appealing party and a different result would have been probable if the defect had not occurred is "mandatory". Code Civ.Proc. § 475.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Statute".

### 10. Appeal and error ⇨1170(1)

The constitutional provision that no judgment shall be set aside unless the error complained of has resulted in a miscarriage of justice is "mandatory". Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Constitutional Provision".

### 11. Appeal and error ⇨15

Wherever possible a litigated controversy should be finally disposed of by a single appeal. Code Civ.Proc. § 956a.

### 12. Work and labor ⇨27(4)

In action for reasonable value of labor and materials used to construct a sewer, written memorandum requesting plaintiff to construct the sewer, recognizing additional water that might entail additional expense, was properly admitted, where memorandum was written expressly to modify original written agreement for construction of sewer and supported defendant's contemporaneous oral cost plus agreement.

### 13. Interest ⇨39(3)

Where judgment was rendered for reasonable value of construction of a sewer, allowance of interest from date of acceptance of the sewer was not authorized and allowance of interest from date of judgment was proper.

### 14. Costs ⇨234

Where judgment was modified to allow interest to plaintiff from date thereof and not from a prior date, defendant was entitled to its costs on appeal.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Martin Culjak and another, co-partners, doing business under the firm



name and style of Culjak and Zelko, against Better Built Homes, Inc., for the reasonable value of labor and materials used in the construction of a sewer. From a judgment for plaintiffs, defendant appeals.

Judgment modified and, as modified, affirmed.

Irvin C. Evans and Daniel N. Dougherty, both of Los Angeles, for appellant.

Earl E. Howard, of Hollywood, for respondents.

MOORE, Presiding Justice.

Defendant appeals from a judgment in the sum of \$9,746.82 as the reasonable value of labor and materials for the construction of a sewer. The principal grounds of appeal are that the findings made are contradictory and irreconcilable; that they do not support the judgment; that they are not supported by the evidence; that the court failed to find on a material issue.

About the 20th day of February, 1941, after extended negotiations, the parties executed a writing bearing the date of January 20, 1941, whereby, for the sum of \$3,306.80, the plaintiffs agreed to furnish all labor and materials and construct a sanitary sewer in lot 372 of tract 1000, in San Fernando Valley, in the city of Los Angeles. According to certain plans and profiles prepared by defendant subsequent to the execution of the writing, the engineering department of the city declined to permit the construction according to the plans adopted by the contract and changes were made requiring additional construction and the addition of metal gasket forms wherever water should be encountered. By reason of the new requirements the parties agreed upon the additional costs of construction according to the modified plans and on or about the 13th day of March, defendant agreed in writing to pay plaintiffs the additional sum of \$234.20. After the 13th of March, 1941, San Fernando Valley experienced continuous and heavy rains as a result of which the water level in the area of tract 1000 rose approximately 20 feet higher than the level which obtained in February. Such rise in the water level caused the area in which the sewer was to be constructed to be filled with water. Thereafter on the 12th day of May, Mr. Culjak stated to the officers of defendant that by reason of the water-soaked condition of the ground, plaintiffs could not proceed with the work for the price stipulated in the written contract;

that if defendant would wait until the water level should subside, the construction could be done at the price originally named but otherwise not by plaintiffs. In reply to Mr. Culjak, defendant's officers stated that the job had to be done immediately and directed plaintiffs to proceed. Mr. Culjak declined to proceed without some written authorization to do so, whereupon Mr. Joel E. Moss, president of the defendant, wrote Mr. Culjak as follows: "Please continue with your contract for sewer recognizing additional water that may entail additional expense." Following the last mentioned conference on May 12, plaintiffs began the construction of the sewer which they completed on July 11. During the course of construction the use of numerous materials and devices as well as of the services of workmen in addition to that which would have been required prior to the excessive rainfall were utilized in the construction of the sewer according to the plans and the city's specifications.

Defendant having refused to pay the bill presented by plaintiffs, they later filed this action on the 28th day of August 1941. The amended complaint contains four separate causes of action. Each of them alleges the performance of the work and the cost in the sum of \$9,746.82. The first count alleges the written contract and the amendment thereto on the 12th of May; the reasonable cost of additional material and of the use of other equipment necessitated by changes in the plans and rise of the water level in the sum of \$6,440.02. The second count alleges a verbal agreement on the 12th of May, 1941, to construct the sewer according to new plans and profiles submitted by defendant to and recognized by the city of Los Angeles; that such plans and profiles required the construction of the sewer at a depth of about 12 feet below the level originally specified and which plans comprehended the rise of the water level into the area where the sewer was to be constructed which required "the use of water pumps, tight sheathing, rock shield, gaskets and equipment adapted to use in such water-bearing soil, all of said work would be done to the satisfaction and approval of the engineering department of the city of Los Angeles; that in consideration of the performance of said work by plaintiffs, said defendant agreed to pay to plaintiffs the cost of construction plus 10 per cent of the cost of construction for social security, public liability, property damage and workman's compensation plus

15 per cent of the cost of construction to cover the plaintiff's overhead and profit."

The third count alleges an implied agreement arising out of the construction of the sewer pursuant to the request of defendant, the construction and its value, and the refusal of defendant to pay.

The fourth count adopts the allegations of the first count and in addition thereto makes appropriate allegations for the foreclosure of their mechanic's lien.

[1-3] In finding II the court determined the facts in accordance with the allegations of Count II in that the parties entered into a verbal agreement on May 12, 1941; that between the 12th day of May, 1941, and the 23d of July, 1941, plaintiffs constructed the sanitary sewer and house connections; that the cost of such construction is \$9,646.82. Appellant contends that it was prejudiced by the failure of the court to show by its finding "the calculation by which the court arrived at its judgment." Evidently appellant desires to have the court's opinion or a picture of the court's mental process by which the ultimate fact of the aggregate cost was derived. To such contention we do not yield. While it is essential that the "reasonable values" be alleged and that they be proved by competent evidence yet the function of the finding is to declare only the ultimate fact determined. *Forman v. Hancock*, 3 Cal.App.2d 291, 39 P.2d 249; *Brea v. McGlashan*, 3 Cal.App.2d 454, 467, 39 P.2d 877; *Mammoth Gold Dredging Co. v. Forbes*, 39 Cal.App.2d 739, 753, 104 P.2d 131. The trial court is not required to incorporate evidentiary facts in its findings. In its brief appellant says that "each one of the items of labor and materials together with the costs therefor was in evidence." We must assume that, because of the presence of evidence of "each item" and the identity of their aggregate amount with the total found ultimately to have been incurred and to be unpaid, the items so proved establish the basis of the court's computation. Since the pleadings and the evidence both warrant the finding of the amount to which plaintiffs are entitled more details of fact in the finding would be surplusage.

It was determined by finding IV that on or about the 20th day of January, 1941, the parties contracted in writing for plaintiffs to construct the sewer and house connections at the agreed price of \$3,306.08 but that such agreement was based upon plans prepared by defendant which had not been

accepted by the city; that after the execution of the written contract material changes were made pursuant to the requirements of the city; that defendant submitted blue prints of the new plans to plaintiffs and offered to pay additional sums by reason of the changes; that thereafter the area of the construction experienced such heavy rainfalls as to cause the rise of the water level; that because of such changed conditions, defendant recognized the necessity of additional cost to be entailed; that the memorandum of May 12 was not executed by defendant without consideration; that the cost of additional labor and use of equipment arising by reason of the change in plans and because of the water condition is the sum of \$6,440.02 which added to the sum specified in the original contract of \$3,306.80 aggregated \$9,746.82, the reasonable value of the construction.

[4] The findings embrace every material issue. There is no inconsistency in them. All relate to the meetings of the minds of the parties for the construction of the same sewer, at the same price. The finding that they first agreed in writing and that such contract was modified by supplemental writings is not inconsistent with the finding that prior to performance they orally agreed to do the same construction upon the same terms contained in the original contract and its supplements. It is true that the written contract was in existence on May 12, but that did not prevent the parties from discussing the new developments, the additional requirements and costs of the extra work and equipment and an oral agreement that plaintiffs do the work according to the new terms discussed. Neither did the writing forbid the actual construction either according to the terms orally discussed or according to the memorandum requesting plaintiffs to construct the sewer, "recognizing additional water that may entail additional expense."

[5, 6] If the findings are not incapable of being harmoniously construed the judgment may not be set aside. *Lasher v. Faw*, 209 Cal. 726, 732, 289 P. 821. In *Baird v. Ocequeda*, 8 Cal.2d 700, 67 P.2d 1055, suit was brought to foreclose a materialman's lien and for the "contract price." An amendment to the complaint was allowed at the conclusion of the trial to allege the reasonable value. Such amendment was held not to constitute a new or different cause of action but merely a different statement of the same cause. Since the evi-

dence was such as to support a recovery on either theory it was adjudged that "the findings on the inconsistent theory may be disregarded as surplusage." Therefore if any finding against defendant were "inconsistent" with the finding of a "verbal agreement" of May 12, 1941, it is harmless since there is no finding inconsistent with that of defendant's obligation to pay the reasonable value of the cost of construction of the sewer and the evidence is sufficient to support each finding made. Water pumps, gaskets, rock, cement, plaster, shields and extra labor were necessitated by reason of the modified plans and the high water level.

[7-11] But aside from the foregoing, if we concede the inconsistency of the findings, it cannot truly be said that the entire record discloses a miscarriage of justice. In such event the judgment can not be disturbed. Constitution, Art. VI, § 4½. In order to justify the reversal of a judgment because of defective findings it must affirmatively appear not only that substantial injury has been caused and that substantial rights have been affected but also that a different result would have been probable if the defect had not occurred. *Lutz v. Merchant's National Bank*, 179 Cal. 401, 177 P. 158; *Murnane v. Le Mesnager*, 207 Cal. 485, 495, 279 P. 800. On this point the code as well as the constitution is mandatory. § 475, Code of Civil Procedure; § 4½, Art. VI supra. Whenever possible a litigated controversy should be "finally disposed of by a single appeal." § 956a, Code Civil Procedure; *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970.

[12] The receipt in evidence of the memorandum of May 12, 1941, was a correct ruling. It was written expressly to modify the original written agreement. We conceive of no competent reason for its exclusion. Moreover, it gives support to the oral agreement of that date proved by plaintiffs and performed by them.

[13] Finally, appellant contends that the allowance of interest from the date of the acceptance of the work, August 19, 1941, is not authorized. Such contention is correct in view of the fact that the judgment is for the reasonable value of the work. *Associated Wholesale Electric Company v. S. H. Kress & Company*, 11 Cal.App.2d 592, 54 P.2d 38.

[14] It is therefore ordered that the judgment be modified by striking therefrom

the following words, to wit, "from the 19th day of August, 1941," and by inserting in lieu thereof: "From date hereof"; that as so modified the judgment is affirmed, the appellant to recover its costs on appeal.

W. J. WOOD and McCOMB, JJ., concur.



58 Cal.App.2d 560

**KLUTTS v. RUPLEY.**

Civ. 6775.

District Court of Appeal, Third District,  
California.

May 11, 1943.

**1. Judgment** ⇨256(2)

Judgment awarding damages for fraud and deceit was not defective because of court's failure expressly to find that defendant did not intend to contribute \$5,000 to enterprise when he promised to do so, where court found that defendant made the representations as alleged in complaint, including promise to pay \$5,000, and that defendant knew such representations to be false at the time he made them.

**2. Fraud** ⇨58(3)

In action for fraudulently inducing plaintiff to engage in a lumbering enterprise by falsely representing that defendant had a contract to cut timber on certain land and would contribute \$5,000 toward cost of erecting mill thereon, evidence as to defendant's subsequent statements and conduct warranted inference that defendant did not intend to contribute \$5,000 to the enterprise when he promised to do so.

**3. Appeal and error** ⇨1008(1)

Whether promisor intended not to fulfill promise at the time he made it is a matter peculiarly to be deduced from the facts in evidence by the trial judge.

**4. Fraud** ⇨49

A single misrepresentation of a material fact knowingly made with intent to influence another, if believed and relied on by such other, is sufficient to warrant relief for "fraud", so that plaintiff need not prove that all of several specifications of



fraudulent representations are true. Civ. Code, § 1572.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

**5. Fraud**  $\Rightarrow$ 58(2)

In action for fraudulently inducing plaintiff to engage in a lumbering enterprise by falsely representing to him that defendant had acquired right to cut timber on certain land, conflicting evidence sustained finding in support of judgment for plaintiff that defendant knew such representation to be false when he made it.

**6. Fraud**  $\Rightarrow$ 13(2)

A misrepresentation of facts cannot be justified by an alleged belief wholly unsupported by the facts.

**7. Fraud**  $\Rightarrow$ 58(1)

Evidence that, in reliance on defendant's false representations that defendant had right to cut timber on certain land and would provide financial assistance needed by plaintiff to complete erection of a mill thereon, plaintiff expended money, time, and labor in clearing a mill site and commencing construction of a mill, showed that plaintiff was damaged by such misrepresentations of defendant so as to be entitled to judgment in action for fraud. Civ.Code, § 1572.

**8. Fraud**  $\Rightarrow$ 58(1)

Evidence that defendant induced plaintiff to engage in a lumbering enterprise by falsely representing that defendant had right to cut timber on certain land and would contribute financial assistance needed by plaintiff to complete erection of a mill thereon, and that such representations were made with defendant's knowledge of their falsity, established "actual fraud" on the part of defendant within statutory definition thereof. Civ.Code, § 1572.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Fraud".

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by F. L. Klutts against A. J. Rupley for damages for fraud and deceit. Trial before the court without a jury resulted in a judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Lyons & Roberts, of Placerville, for appellant.

Thomas Maul, Richard Barry, and C. W. Pearson, all of Placerville, for respondent.

ADAMS, Presiding Justice.

Appeal from a judgment in favor of plaintiff in an action for fraud and deceit. The complaint alleged that in 1937 defendant represented to plaintiff that he had a contract with the Earl Fruit Company entitling him to cut all the timber from certain described lands belonging to said Earl Fruit Company; that relying upon the aforesaid representations plaintiff agreed to join with defendant and one G. E. Tuman in cutting said timber, converting same into lumber and selling the same, under the name Baltic Creek Lumber Company; that plaintiff and Tuman agreed to clear a portion of said land, prepare a millsite and lumber yard thereon and furnish the labor, lumber and machinery for the construction of a sawmill, while defendant agreed to advance \$5,000 to defray a portion of the expenses; that in reliance upon defendant's statements plaintiff and Tuman, at great cost and expense to plaintiff, and with the knowledge and approval of defendant, entered upon said land at a place designated by defendant, hired labor and cleared away a site for a mill at an expenditure of \$2,686.40; that plaintiff also dismantled a mill owned by him in Siskiyou County and moved said mill with its tools and appurtenances to the new millsite at an expense of \$450; that after the construction of the mill had begun, he called upon defendant for the \$5,000 he had agreed to pay, but that defendant refused to comply with his agreement.

It was further alleged that defendant did not have any interest whatsoever in the said lands nor any contract with the Earl Fruit Company, to cut timber thereon, that defendant's representations to plaintiff that he had such rights were false and were made by defendant with the intention that plaintiff should rely thereon and that plaintiff did rely thereon; and that plaintiff did not learn that said representations of defendant were false until after plaintiff had prepared the millsite, transported his equipment to said site and commenced the construction of the mill; that thereupon he and Tuman had discontinued their construction and plaintiff had moved his mill to Plumas County, but too late to start lumber operations there that winter; that

he incurred an expense of \$650 in moving his mill, and suffered damages in the sum of \$3,000 by reason of his moving his equipment to El Dorado County and his inability to carry on lumber operations during the year 1938.

Defendant in his answer admitted that he had stated to plaintiff that he had a right, under an agreement with the Earl Fruit Company, to cut all of the timber from the Baltic Creek area; but he alleged that he had stated to plaintiff that there was a fair site for a sawmill on Baltic Creek and that if plaintiff wanted to build a mill there he could do so and defendant would supply the mill with logs when it was ready for operation; that he agreed to sell to plaintiff and plaintiff agreed to purchase all of said timber at a given rate. He admitted that plaintiff entered upon the premises with the knowledge and approval of defendant, and with the aid of labor had cleared away timber in preparation of a site for the construction of a mill, and that plaintiff, at his own expense, had moved certain machinery and equipment upon said millsite. He denied that plaintiff had expended any sum in excess of \$150 in the transportation of said equipment from Siskiyou County, and denied generally and specifically the other allegations of plaintiff's complaint.

The cause was tried before the court without a jury, and findings of fact were filed wherein the allegations of plaintiff's complaint were found to be true, except that the amount which would compensate plaintiff for the detriment proximately caused him by the wrong done him by defendant was found to be \$1,625.86. The allegations of defendant's answer hereinabove set forth the court found to be untrue. Judgment for plaintiff in the sum of \$1,625.86 followed, and defendant has appealed.

Appellant's first contention is that the judgment is defective in that there is neither an allegation in the complaint nor any evidence nor any finding of fact that the defendant fraudulently intended to refuse to pay \$5,000 to the plaintiff at the time he is alleged to have agreed to do so. Appellant's argument on this point is that the failure to perform a promise gives rise to no cause of action for fraud unless it is alleged and proven that the promisor did not, at the time it was made, intend to perform it. Apparently he contends that there is an insufficient showing that he did not

intend to put up the \$5,000, and that, therefore, plaintiff has not proved a case of fraud on the part of defendant. We do not agree with this contention.

[1-4] The trial court found that appellant made the representations as alleged in plaintiff's complaint, including the promise to put up \$5,000; it also found as to appellant's representations and statements that at the time he made them he knew them to be false; and while the court did not, in so many words, find that appellant did not, at the time he made the statement, intend to put up any money, there is evidence to support such an inference. One's intent in such matters is usually not susceptible of direct proof, but it may be ascertained from his future conduct and speech; and the fact as to such intent is one peculiarly to be deduced from the facts in evidence, by the trial judge. *Tench v. McMeekan*, 17 Cal.App. 14, 20, 118 P. 476; *Holiday v. Tolosano*, 39 Cal.App. 151, 153, 178 P. 170. G. E. Tuman testified that in April or May, 1938, he had a conversation with Rupley in which the latter suggested that they let Klutts "slip out of the picture," then he and Tuman would secure use of the mill and the buildings Klutts had put up, and go on and put their own outfit there, and that he was not going to help Klutts finish the mill; that he did not tell this to Klutts, but did tell him he would not get any financial help from Rupley. Edward E. Tuman also testified to this conversation between G. E. Tuman and Rupley in March or April, 1938, and stated the latter said that his idea was to sit tight, not put up any money, that then Klutts could not complete the mill but would abandon it, and they could then operate without him. Furthermore, defendant's agreement that he would put up the \$5,000 was but one of the representations made by defendant, upon which plaintiff relied, and a plaintiff is not required to prove that all the specifications of fraudulent representations are true; a single misrepresentation of a material fact, knowingly made with intent to influence another, if believed and relied on by that other, is sufficient to afford relief. *Neff v. Engler*, 205 Cal. 484, 490, 271 P. 744; *Harris v. Miller*, 196 Cal. 8, 16, 17, 235 P. 981.

[5,6] Appellant's second argument is that there is no substantial evidence that when he informed respondent that he had an agreement with the Earl Fruit Company by which he had acquired the right

to cut timber from its lands, he made said representations with knowledge that they were false. The court has found that he did, and the evidence supports such finding. A misrepresentation of facts cannot be justified by an alleged belief wholly unwarranted by the facts. *United States Nat. Bank v. Stiller*, 119 Cal.App. 442, 444, 6 P. 2d 529.

It was admitted by respondent that he told Klutts that he had a contract with the Earl Fruit Company, but he testified that he did have an oral contract with Mr. Barton, vice president, and Mr. Kerns, secretary, of that company. The depositions of Mr. Barton and Mr. Kerns were taken, and these witnesses testified that they had never had a contract or verbal understanding with Rupley regarding the Baltic Creek area of the company's lands, nor granted him any right to cut timber there, nor any timber other than that included within two written contracts, neither of which concerned the Baltic Creek area here involved; that Rupley had written them in September, 1937, that he had a party interested in putting up a mill on Baltic Creek, and had asked for a lease of 10 acres, but that they did not enter into such a lease.

[7] Finally, appellant urges that there is no evidence to support the finding that respondent was damaged by the alleged misrepresentations of appellant. There is no merit in this contention. The evidence shows expenditures of money, time and labor made by plaintiff in reliance upon appellant's representations, the expenditures of money shown by his testimony exceeding the amount allowed by the trial court. The decision in *Overstreet v. Merritt*, 186 Cal. 494, 200 P. 11, is pertinent. There plaintiff and defendant entered into an agreement for the formation of a business association, induced by representations of defendant, who thereafter failed and refused to carry out the terms of the agreement. The court said that when defendant, by his breach, deprived plaintiff of all opportunity to make good on the new venture, he became liable in damages for any loss suffered by plaintiff as the natural result of such default; and it was held that plain-

tiff was entitled to recover such loss as he had sustained in preparing to carry out his part of the contract. Also see *Caspary v. Moore*, 21 Cal.App.2d 694, 699, 70 P.2d 224.

The testimony of plaintiff and that of G. E. Tuman established that appellant represented to both of them that he had a written contract with Earl Fruit Company to cut all their timber; that he, Tuman and Rupley went together to look over the timber in the Baltic Creek area belonging to said company; that they picked out a millsite with Rupley's approval; that plaintiff told Rupley and Tuman that he would have money enough to do a certain part of the work of constructing the mill, but after that would have to have financial assistance, whereupon Rupley offered to put up \$5,000 to complete the mill; that plaintiff moved his machinery to the millsite, partly constructed the mill, put up other necessary buildings, and expended several thousand dollars as well as his time and labor; that when he asked respondent to put up money, defendant then and at all times thereafter refused; that the agreement between the three of them was that they were to have a "three-way partnership" in the business which was to be known as the "Baltic Lumber Company"; that plaintiff was to contribute his machinery, labor, supplies and some money, and Rupley was to put up the \$5000 for himself and Tuman.

[8] Under section 1572 of the Civil Code, the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; a promise made without any intention of performing it; and any other act fitted to deceive, when committed by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract, constitutes actual fraud. The evidence in this case is sufficient to establish fraud on the part of defendant within the provisions of the foregoing statute.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concurred.



58 Cal.App.2d Supp. 913

**JACOBS et al. v. LEVIN et al.**

No. 1549.

Appellate Department, Superior Court, City  
and County of San Francisco,  
California.

May 13, 1943.

**1. Fraud**  $\S$  59(2, 3), 60

Under the "loss of the bargain" rule for measuring damages, a defrauded purchaser may recover difference between actual value of property received and value that it would have had had it been as represented, while under "out-of-pocket loss" rule now substituted for the former rule by statutory amendment, the defrauded purchaser may recover the difference between the value of what he parted with and value of the property that he received, and under both rules the purchaser is allowed to recover all expenditures actually made by him as a result of fraudulent conduct of seller. Civ.Code,  $\S$  3343.

See Words and Phrases, Permanent Edition, for all other definitions of "Loss of the Bargain" and "Out-of-Pocket Loss".

**2. Fraud**  $\S$  60

Where statute relating to measure of damages for fraud in sale of property authorized purchaser not only to recover damages under "out-of-pocket loss" rule but also any additional damage arising from particular transaction, additional damage provision was intended to permit recovery for expenses resulting when dangerous character of premises buyer was fraudulently induced to purchase, necessitated his moving. Civ.Code  $\S$  3343.

**3. Fraud**  $\S$  59(2)

Where purchasers' deed did not contain a covenant of the existence of a usable fireplace in residential property purchased, and purchasers did not seek to rescind, purchasers' recovery for vendor's alleged fraud in representing existence of a usable fireplace was limited under the "out-of-pocket loss" rule to the difference between value of what purchasers parted with and value of property received, and where trial court found that property was worth more than the purchasers paid for it, purchasers were not entitled to recover damages. Civ. Code  $\S$  1789(7), 3343.

Appeal from Municipal Court, City and County of San Francisco; Theresa Meikle, Judge.

Action by Ernest E. Jacobs and another against Daniel Levin, and another for damages resulting from purchase of property. Judgment for defendants, and plaintiffs appeal.

Judgment affirmed.

Elliott M. Epstein, of San Francisco, for appellant.

Linforth, Cannon & Miller, of San Francisco, for respondent.

McWILLIAMS, Judge.

Plaintiffs sued the defendants for damages alleged to have been sustained by them as a result of the purchase of certain San Francisco residence property. The purchase price of the property was \$8,400. At the time that plaintiffs bought the property the living room contained a fireplace which obviously had been used. However, the fireplace contained no chimney or flue which, it developed during the trial, had been sealed up by the defendants many years before. Although the plaintiffs had made a number of inspections of the property before they purchased it they had failed to discover the defect in the fireplace. This conduct of the defendants in failing to notify plaintiffs of the condition of the fireplace was found by the lower court to constitute fraud on their part. That court also found that it would cost \$470 to put the fireplace into a working condition. But the lower court also found that at the time the plaintiffs bought the property it had a fair market value of \$8,950, being \$550 more than the plaintiffs had paid for the property. That court also found that the valuation of \$8,950 was not less than or in any wise affected by the fact that the fireplace was not in a condition to be used. Hence, the court concluded, plaintiffs were not damaged and rendered judgment in favor of the defendants. From that judgment plaintiffs have taken this appeal. They contend that the finding as to the value of the property at the time of the sale is not supported by the evidence and also that even if true it is immaterial. A review of the evidence convinces us that the finding is supported by the evidence, particularly in view of the fact that the testimony offered on behalf of the defendants as to the value of the property was not contradicted by the plaintiffs.

Whether or not the finding referred to is immaterial as contended presents a more serious question. Defendants concede for the purpose of the appeal that the findings of the lower court with reference to the fraud alleged to have been perpetrated by them is supported by the evidence. They contend that since plaintiffs did not show that they were damaged the judgment rendered by the lower court was a proper one. Their position is that since it is apparent under the finding made by the lower court with reference to the value of the property purchased that the plaintiffs received more than their money's worth it must follow that they suffered no damage by reason of the fact that the fireplace was not in a condition to be used.

The plaintiffs, on the other hand, argue that in an action for deceit in the sale or exchange of property, the party defrauded is entitled to recover the difference between the actual value of what he received and the value which it would have had if the representations had been true, citing the case of *George Cople Co. v. Hinds*, 34 Cal. App. 576, 170 P. 155, in support of this contention. Hence, say plaintiffs, if they have shown that the property would have been worth more had there been a usable fireplace in it, as the lower court found was impliedly represented to them by defendants, they are entitled to judgment.

Plaintiffs' conclusion is sound if the law of this State is as they claim. Whether it is sound or not requires a review of the authorities in this State.

[1] Up to 1935 the courts of this State applied what has been termed (*McCormick on Damages*, p. 448; 24 *Am.Jur.* p. 52) the "loss of the bargain" rule for measuring damages in cases of the kind here presented. Under this rule which prevails in most states a plaintiff who is defrauded in the purchase of property is allowed to recover the difference between the actual value of the property received and the value that it would have had had it been as represented. *Porter v. Hilton*, 214 Cal. 705, 708, 298 P. 501, 7 P.2d 301. Our Supreme Court in one case apparently realized that the application of this doctrine, which it termed "the extreme rule", might at times result in hardship and therefore held that it was only to be applied in clear cases and on just terms. *Hines v. Brode*, 168 Cal. 507, 511, 143 P. 729.

The opposing rule which is followed in a few states and also in the Federal Courts

and in England (*McCormick on Damages*, p. 448; also see *Sigafus v. Porter*, 179 U. S. 116, 21 S.Ct. 34, 45 L.Ed. 113 and cases there cited) has been termed the "out-of-pocket loss" rule. Under that rule the defrauded plaintiff is allowed to recover the difference between the value of what he parted with and the value of the property that he received. He is also allowed to recover under this rule as well as under the "loss of the bargain" rule all expenditures actually made by him as a result of the fraudulent conduct of the seller. (*McCormick on Damages*, p. 458; *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 578, 126 P. 351, 42 L.R.A., N.S., 125). The reason for this rule is, as stated by one federal court that:

"A person is not cheated, when that which he gets is worth all that he pays for it, which is also common sense. He may anticipate more, and be falsely led to expect it, on the strength of which he may be entitled to be relieved from the bargain. But if he holds onto it, he cannot claim damages for the deceit, if he has suffered no loss, which is the case, where, although not getting all that he had the right to expect, he gets after all the worth of his money." *Pittsburg L. & T. Co. v. Northern Ins. Co.*, D.C., 140 F. 888, 898.

However, in view of the fact that since the federal courts are required since the overruling of *Swift v. Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865, by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, to follow state decisions on matters of general law the main support for the minority rule would appear to have collapsed.

In opposition to the "out-of-pocket loss" rule it is urged that, as stated by Professor Williston: "A practical reason for the enforcement of the broader rule may be found in the fact that under the other rule a fraudulent person can in no event lose anything by his fraud. He runs the chance of making a profit if he successfully carries out his plan and is not afterwards brought to account for it; and if he is brought to account he at least will lose nothing by his misconduct". 5 *Williston on Contracts*, Rev.Ed., § 1392.

Neither rule has proved altogether satisfactory and as a result the law has fluctuated from time to time in some of the states. 24 *Am.Jur.* p. 60.

After considering the merits of the two rules the American Law Institute in its Re-

statement of the Law of Torts adopted the federal or "out-of-pocket loss" rule. Restatement § 549.

In 1935 the Legislature of this State added Sec. 3343 to the Civil Code. It reads as follows: "(Damages for fraud in the purchase, sale or exchange of property.) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled".

By that amendment the "out-of-pocket loss" rule was substituted for the "loss of the bargain" rule. See *Rothstein v. Janss Inv. Corp.*, 45 Cal.App.2d 64, 73, 113 P.2d 465; 13 So. Cal. Law Rev. 168.

[2] It is true that the first sentence of the section authorizes a purchaser not only to recover damages under the "out-of-pocket loss" rule, but also to recover any additional damage arising from the particular transaction. That latter provision was evidently intended to cover a situation where for example a buyer was obliged to move from the property that he had been fraudulently induced to purchase on account of the dangerous character of the premises. In such a case he could not only recover the difference between the amount that he had paid for the property and its actual value but also recover the expense of moving. *Barr v. Kimball*, 43 Neb. 766, 62 N.W. 196. Also see *McRae v. Lonsby*, 6 Cir., 130 F. 17; *Womack v. Hastings & Lagow*, Tex. Civ. App., 200 S.W. 878.

[3] If the instrument of conveyance taken by plaintiffs had contained a war-

ranty or covenant of the existence of a usable fireplace they could have sued on such warranty or covenant even though the sellers had known that there was no fireplace in the building when they executed the deed and intended to deceive the plaintiffs. In such an action the plaintiffs could have recovered the difference between the value of the land as they received it and its value with the fireplace. In other words the "loss of the bargain rule" of damages would have been applicable. This is well-settled in the law of sales of personal property and we see no reason why the same doctrine should not be applied by analogy in the case of the sale of real property. The reason for the rule in the law of sales is that ordinarily the buyer in case of a breach of warranty is entitled to recover the difference between the value of the goods at the time of their delivery to the buyer and the value the goods would have had if they had answered the warranty. C.C. § 1789(7). The addition of the element of fraud will not deprive the buyer of rights that he would have had if the element of fraud were lacking. 5 Williston on Contracts, Rev. Ed., § 1392, p. 3886.

This doctrine to which we have just adverted suggests an explanation of the proviso in section 3343 to the effect that nothing in the section shall be deemed to deny to any person having a cause of action for fraud any legal or equitable remedies to which such person may be entitled. But it cannot avail plaintiffs because it does not appear that there was any covenant of the existence of a fireplace in the deed taken by plaintiffs. The proviso would also have authorized plaintiffs to rescind the purchase had they seen fit to take such action. But in view of the failure of the plaintiffs to rescind the purchase it is evident that the judgment of the trial court was correct. It is therefore affirmed.

GRIFFIN, P. J., and FOLEY, J., concur.



58 Cal.App.2d 791

**PEOPLE v. PRITCHARD.**

Cr. 3671.

District Court of Appeal, Second District,  
Division 3, California.

May 25, 1943.

**1. Burglary §41(1)**

Evidence, including accused's conflicting statements as to whether accused or another person took stolen goods from third person's room and removed them to accused's home, supported burglary conviction.

**2. Criminal law §511(7)**

Where accomplice testified that he entered house and placed goods on or near window sill, that accused reached in and took goods out through window, and that goods were carried away in accused's automobile and divided the next morning, and accused corroborated this testimony except that he denied having reached in window, there was sufficient "corroboration" to support burglary conviction.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Hudson P. Pritchard was convicted of committing two burglaries, and he appeals. Affirmed.

Paul Angelillo, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

BISHOP, Justice pro tem.

The defendant was charged in two informations with having committed two burglaries, one in connection with the room of Price McNutt, the other at the house of John S. Roberts. The cases were consolidated for trial, tried, and from the consequent judgments of conviction the defendant has appealed. The only theory on which a reversal is sought in either case is that the evidence was insufficient to support

the conviction. We find that the evidence was ample.

[1] With respect to the burglarious entry of the room of Price McNutt the defendant presents no argument on appeal other than this statement appearing at the conclusion of his narration of facts concerning the McNutt case: "In other words, the conversation at the time of the visit of McNutt to Mr. Pritchard's home clearly indicated that the wearing apparel of McNutt was taken to appellant's home by Chelf." The conversation referred to was that of the defendant who said that the goods which had been stolen from McNutt's room had been taken to the defendant's room by one Chelf. It would seem that the statement of the defendant to officer Lewis, made on a different occasion, that he (the defendant) had taken the goods out of McNutt's room himself, was believed, rather than the explanation he made in the conversation referred to. The defendant was a witness at the trial, but with the express understanding that he was not appearing in the McNutt case, and he gave no testimony concerning it.

[2] Defendant's argument in the Roberts' case is limited to the point that the testimony of one whose story made him an accomplice of the defendant was not sufficiently corroborated. The accomplice testified that he entered Roberts' place through a rear window and placed all the movable contents of the house upon the window sill, or on a desk just inside the window. The defendant reached in and took the goods, and made a pile of them outside. They then carried them to the defendant's car, drove with them to the accomplice's room, and then, the next morning, divided them up. The defendant as a witness corroborated this testimony of the accomplice in detail, except that he denied having reached in the window to take any of the stolen property. If authority is needed that such corroboration is sufficient, it is not lacking. See *People v. Negra*, 1929, 208 Cal. 64, 69, 280 P. 354, 357; *People v. Andrew*, 1941, 43 Cal.App.2d 126, 130, 110 P.2d 459, 461; *People v. White*, 1941, 48 Cal.App.2d 90, 94, 119 P.2d 383, 385.

The judgments of conviction are affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

58 Cal.App.2d 608

**PEOPLE v. MILLS.****Cr. 476.****District Court of Appeal, Fourth District,  
California.****May 18, 1943.****1. Rape** ⇨51(1)**Robbery** ⇨24(1)**Sodomy** ⇨6

Testimony of complaining witness, together with evidence as to her physical condition and other evidence, and the finding of her money and pay check in possession of defendant, was sufficient to support conviction for rape, sodomy, sex perversion, and robbery.

**2. Criminal law** ⇨13

The statute relating to the infamous crime against nature is not subject to objection that it merely fixes a punishment but does not make the act a crime or a public offense. Pen.Code, § 286.

**3. Robbery** ⇨24(5)

Evidence that complainant's money and pay check were taken from complainant's possession in her presence and were later found in defendant's possession, together with evidence as to bruised condition of complainant's face and body, established the use of force or threats necessary to constitute robbery.

**4. Criminal law** ⇨1122(1)

Record disclosed that jury was fully and fairly instructed with regard to the benefit of the presumption of innocence.

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Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Stewart Roger Mills was convicted for rape, sodomy, sex perversion, and robbery, and, from the judgment and order denying his motion for new trial, he appeals.

Affirmed.

Joseph E. Daly, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged, in separate counts, with forcible rape, sodomy, sex

perversion and robbery. A jury found him guilty on all four counts and he has appealed from the judgment and from an order denying his motion for a new trial.

It would serve no useful purpose to review the evidence in its entirety. The complaining witness, who was a taxicab driver, met the appellant at a cafe on a Sunday afternoon in response to his call for a taxicab. He hired the taxicab by the hour and stated that he wanted to finish a drink. She remained with him at the cafe for approximately three hours, from 12:15 P. M. to 3:15 P. M., during which time he consumed three drinks. They then started out in the taxicab on his statement that he wanted to be taken to a certain place where a "crap game" was in progress. She did not know the location of the place in question and he told her to drive on, that he would direct her. Following his directions she proceeded into the hills easterly from San Diego and finally onto a side road, where most of the incidents in question occurred. As they were returning to San Diego she observed him going through her purse. When they arrived at a point well within the populated section of San Diego he directed her to stop near an alley. She jumped out of the taxicab, ran into the street and hailed a passing motorist asking him to take her to the police department. At the same time she observed the appellant running down the alley. She was taken immediately to police headquarters, arriving there about 6:30 P. M. She told her story to the officers and was examined by a police surgeon. The appellant was arrested about an hour later at his home. The officers found him asleep on the porch with an empty quart beer bottle beside him and a full glass of beer on the ground. The appellant was able to answer questions when he was taken to headquarters. He told the officers that he remembered being at this cafe but could remember nothing else. He stated that he was drunk and did not know what he had done. A little later, he told the officers that he did not want the woman to testify against him and that he wanted to plead guilty. The complainant's wallet was found in the appellant's pocket containing a part of the paper money which she stated had been in it, and a pay check issued to the complainant, which had been in her purse, was found in the appellant's home.

It is first contended that the evidence is insufficient to support the judgment. It is

not, and could not well be, argued that the testimony of the complaining witness, if believed, was not sufficient to support the judgment. It is argued, however, that her testimony is so utterly incredible that it may not be accepted as supporting the judgment. In support of this it is claimed that it was physically impossible for one thing, to which she testified, to have occurred. While this part of her testimony seems questionable we are not prepared to say that it involves a physical impossibility. In any event, it is material only as bearing upon the veracity of the complaining witness. Whether or not the jury believed that particular statement they were not required to disbelieve the rest of her testimony. It is further argued that it appears from the evidence that the complaining witness did not resist the appellant and that she voluntarily submitted to him. This is based upon portions of her testimony to the effect that at certain times while the affair was in progress she made no resistance. There was however, evidence of very considerable force used by the appellant and of serious threats made by him in order to accomplish his purpose. The complaining witness testified that after her fears were aroused by certain actions of the appellant, while they were driving in the hills, she started to drive back to San Diego; that she did not turn off from the road at one intersection when the appellant directed her to do so and that he ordered her to turn off at the next intersection, saying "I have a gun on you"; that this was a dead-end street; that when she stopped to turn around the appellant jumped out of the back seat; that she then jumped out of the front seat and began to run; that the appellant grabbed her and pulled her back to the cab; that she then decided she had to make a fight for it and took off her glasses and started fighting and struggling; that the appellant then became angry and stated "Now you are in for it"; that he threatened to bash her brains out against the pavement if she made any noise and pulled her into the cab; that he threatened to kill her whenever she made a move to get out of the cab; that he struck her on the head with his hand and again with his fist; that he took hold of her ears and hair and moved her head back and forth; that he pinched her nose many times, hurting her severely; that he threatened to kill her several times and four or five other times threatened to bash her brains out; and that

he also made threats of a most serious nature of what he would do to her daughter.

[1] The story told by the prosecuting witness finds considerable corroboration in the evidence of her condition when she arrived at the police headquarters shortly after she left the appellant. This appears not only from the testimony of the doctor who examined her but from the testimony of the officers that when she arrived there she was very nervous, almost hysterical, her clothes were disheveled and dirty, her face slightly bruised and her nose badly bruised and discolored with what looked like blood blisters upon it. She went immediately to the police when she escaped from the appellant and her story is confirmed by the bruises on her body, some of which we have not mentioned, and by the finding of her money and pay check in the possession of the appellant. The appellant further argues that it conclusively appears that he was so drunk that he did not know what occurred on this occasion. He so stated to the officers although he did not take the stand at the trial. The evidence, in its entirety, would fully warrant the jury in arriving at a different conclusion. The entire question was one of fact and it cannot be said, as a matter of law, that the evidence was not sufficient to support the judgment. *People v. Burnette*, 39 Cal.App. 2d 215, 102 P.2d 799; *People v. Ogden*, 41 Cal.App.2d 447, 107 P.2d 50.

[2] The appellant next contends that the offense known as the infamous crime against nature is not a crime in this state, that Section 286 of the Penal Code simply fixes a punishment but does not make that act a crime or a public offense, and that in the absence of any statutory provision there can be no such offense in this state. This argument is sufficiently answered in *People v. Boljat*, 36 Cal.App. 2d 644, 98 P.2d 513, 1025, and in *People v. Battilana*, 52 Cal.App.2d 685, 126 P.2d 923.

[3] It seems to be contended that there was not sufficient proof of the use of force or threats in connection with the taking of the complainant's money and pay check. These articles were taken from the complainant's purse in her presence and the matters to which we have already referred sufficiently disclose the elements necessary to constitute the crime of robbery.

[4] Considerable space is devoted in the appellant's briefs to the contention that he



was not given the benefit of the presumption of innocence. The record does not sustain this contention and the jury was fully and fairly instructed in that regard.

In the opening brief it was suggested that the instructions were erroneous without any attempt to point out any particular respect in which this was true. In the closing brief prejudicial error is assigned in refusing to give instructions, requested by the appellant, directing the jury to acquit him and directing the jury to discharge him on the ground "that the court has no jurisdiction of the offense, and that the facts charged do not constitute an offense punishable by law." These matters are sufficiently covered by what we have said and both instructions were properly refused. We have carefully studied all of the instructions and have found no error therein.

The judgment and the order appealed from are affirmed.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 641

**WILSON v. WILSON.**

Civ. 2844.

District Court of Appeal, Fourth District,  
California.

May 20, 1943.

**1. Divorce ☞312**

Findings of the trial court as respects the welfare of minor children of divorced parents will not be disturbed on appeal unless the evidence in support thereof is so slight as to indicate a want of ordinary good judgment and an abuse of discretion.

**2. Divorce ☞27(1)**

Whether grievous mental suffering as ground for divorce has been inflicted is a question of fact to be deduced from all the circumstances of each particular case.

**3. Divorce ☞130, 253, 301**

Evidence supported decree denying divorce, and custody of the parties' minor children and community property to wife on ground of physical cruelty and grant-

ing divorce, and custody of the children and the property to husband on ground of grievous mental suffering because of wife's membership in Jehovah's Witnesses.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Greta A. Wilson against Charles C. Wilson for divorce, and custody of the parties' five minor children and the community property, wherein defendant filed a cross-complaint. From a decree for defendant, plaintiff appeals.

Affirmed.

Earl F. Crandell, of Los Angeles, for appellant.

Wolford & Heald, of Brawley, and Darwin H. Wolford, of Beverly Hills, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant commenced this action against defendant and respondent alleging certain acts of claimed physical cruelty, sought a divorce, custody of the five minor children, and the community property. Defendant answered, filed a cross-complaint, alleged extreme cruelty, and sought reciprocal relief. Six children were born of this marriage. The oldest, at the time of the beginning of this action, was 21 years of age, and married. The youngest was seven years of age.

The main difficulty between the parties grew out of plaintiff's association with an organization known as "Jehovah's Witnesses," and defendant's opposition to her membership in it and her conduct in connection therewith, particularly with reference to her distributing literature on the streets of various towns in Imperial Valley, and the influence her conduct and beliefs had upon defendant and the minor children.

The action proceeded to trial. At the conclusion thereof the court denied plaintiff relief on her complaint, awarded the defendant a decree upon his cross-complaint and gave the custody of all of the unmarried children to him and awarded the small amount of community property to the defendant for the benefit of the said minor children. The other provisions of the decree are unimportant to this appeal. It is from the exercise of the trial court's discretion in finding for the defendant and cross-complainant as to the above matters that plaintiff has appealed.

It is not feasible to set out in this opinion all of the evidence in the case. A great portion of it consists of many exhibits in reference to the literature of the organization of which plaintiff was a member. We will, however, attempt to set out sufficient evidence to indicate what the trial court had before it to consider in support of its findings.

Plaintiff argues that the evidence of her activities in connection with the Jehovah's Witnesses was not such that she should be found to be an unfit or improper person to have custody of the children, nor was it such conduct as would constitute a ground for divorce based upon cruelty. Defendant takes a contrary view. Her argument was rejected and defendant's view was shared by the trial court.

Defendant and his wife were married in 1918. He was an automobile mechanic. Their marital status seemed to go fairly smooth until about six years ago when plaintiff became connected with the organization known as Jehovah's Witnesses and became quite active therein. Defendant was opposed to their principles, as he understood them, and remonstrated with his wife in reference thereto. He claims that he came to California to "try to get away from it" but that he was unsuccessful in this respect. He testified that her activities had caused him "worry and anguish"; that his wife would remain away from home and their children until late at night and for days, and that he discovered that she had been gone as long as three days without telling him or making provision for the care of the children; that he, with the aid of the oldest girl, would be compelled to prepare their own meals and see that the children were clean enough to go to school. He testified further that his wife on some of these occasions would go on the streets of Brawley, where he was well known, and for hours endeavor to sell their literature, remaining away from home and the children; that on one occasion he said he did slap her because he had asked her to stay off from the streets selling the literature in the town where he knew so many people; that it interfered with his employment; that two days later he caught her "peddling the magazine" and he took them away from her and slapped her; that on another occasion two weeks later he caught her with a sack full of books and magazines; that he took them away from her; that she called him a "liar" and he

told her what he thought of her books and then he slapped her; that it is impossible for them to live together as long as she follows that creed because she taught the teachings and doctrines of the organization to the children; that he believed that the doctrines so taught were detrimental to the government and to the minds of the children; that plaintiff endeavored to teach them that the organization, as such, does not believe in saluting the flag of the United States, and that the children were fully justified in disobeying and disregarding the laws of our land when they thought such laws conflicted with some construction which the organization might place upon certain passages of the Bible. Defendant further testified that on one occasion when he found plaintiff endeavoring to teach such doctrines to the children in their home late one evening that he said to her: "Get out and let them go to sleep", and that "she started kicking and she kicked the hide off my knee and I still have the scar (exhibiting same). I caught her by the foot as she tried to kick me in the face and dragged her into the other room. She went back and I reached out to take her by the shoulder and she started kicking again, and I caught her by the foot and dragged her back through again, and she threw her shoes at me. I pushed her into the bedroom. She was trying to kick at me. \* \* \* I didn't hit her on that occasion. \* \* \* She started to the police station to have me arrested. I got the two little girls in the car and I thought if she got to the police station they would have trouble in getting me because I wasn't going to the police station unless she went too. I caught up with her before she got there and put her in the car, and I tried to get her to go back home with me and she would bounce out faster than I could put her in \* \* \* the police came along, \* \* \* and they stopped and talked. She was determined to have me arrested. \* \* \* She went home and the next morning she got up and went out and swore out a warrant for me and had me hauled into the police court \* \* \*."

Many exhibits were placed in evidence in an endeavor to show the doctrines being taught by the organization and which she, in turn, it is claimed, imparted to the children. The effect of these teachings, as construed by the trial court, is set forth in the findings in detail. The court then found that the plaintiff, "for approximately ten years last past has been a member of a

certain sect or cult known as Jehovah's Witnesses; that as such member the said plaintiff \* \* \* is engaged in the spreading and dissemination of the doctrines of said sect through public solicitation, public speaking, and the continued distribution of printed matter \* \* \* the author of some of which is one 'Judge Rutherford,' \* \* \* that plaintiff \* \* \* implicitly believes in and advocates all of the matters and things set forth in said exhibits and said printed matter; that some of such printed matter expressly and by implication instructs the members and followers of said sect to disobey and violate the laws of the United States, the State of California, and other local laws whenever and wherever it may appear to the individual member of said sect that any such law does not meet with his or her approval according to his or her interpretation of some passage or passages of the Holy Scriptures \* \* \*"; that "the members of said sect and the said plaintiff \* \* \* refused to salute or recognize the flag of the United States as a symbol of democracy"; that plaintiff, "up to the time of the separation of the parties hereto, kept quantities of such printed matter in the home of said parties for the members of the family and the minor children of said parties to read and study, and said plaintiff \* \* \* taught and instructed the said children \* \* \* in the doctrines of said sect as set forth in said printed matter"; that "for several years last past the said plaintiff \* \* \* in her endeavor to spread such doctrines as aforesaid, has continually absented herself from the home of the parties and has traveled to other places, and at certain of said times has taken the younger children of said parties with her, and caused them to distribute copies of said printed matter upon the streets and in public places and, during the month of August, 1941, said plaintiff so absenting herself from the home of said parties attended a convention of said sect in the East and paid her own expenses in so attending said convention out of the community funds of the said parties. The said plaintiff \* \* \* intends to continue the practice of preaching and spreading the doctrines of said sect and to continue absenting herself from the home of said parties, as she has in the past, in so doing \* \* \* that said defendant \* \* \* during all of the times herein mentioned has been, and now is opposed to the doctrines and teachings of Jehovah's Witnesses and said defendant is opposed to having the

children \* \* \* taught the doctrines and teachings of said sect, disrespect for religion, or disobedience of the laws of the United States, the State of California, or local laws, or disrespect for or refusal to salute the flag of the United States; that said defendant \* \* \* on many occasions has so informed the said plaintiff \* \* \* and many times has requested and demanded that she desist from teaching said doctrines to the children of said parties; that she remain at home and refrain from preaching and spreading the doctrines of said sect upon the streets and in other public places; that the said plaintiff \* \* \* has persistently refused to comply with the wishes and requests of said defendant \* \* \* and has continued \* \* \* in all of said activities, against the will and continued protests of the defendant \* \* \* and on \* \* \* the 30th day of June, 1941, finally left and abandoned the home of the said parties in Brawley \* \* \* so that she might continue in said practices unhampered and without restraint so far as said defendant \* \* \* was concerned." The court then further found "that said defendant on some two or three occasions slapped and spoke harshly, and even cursed the said plaintiff \* \* \* in remonstrating with plaintiff \* \* \* about her conduct in absenting herself from the home and in teaching and preaching the doctrines of said sect which said defendant \* \* \* believed to be unpatriotic \* \* \* and detrimental to the welfare of the minor children \* \* \*; that such conduct by and on the part of said defendant \* \* \* has been and was encouraged and provoked by the actions and continued course of conduct of said plaintiff \* \* \*."

[1-3] It is apparent from the testimony that the trial court was justified in believing that the conduct of the plaintiff was such as to cause and that it did actually cause great and grievous mental suffering on the part of the defendant. The defendant has had the care and custody of the children for more than a period of one year and apparently the plaintiff has chosen the work of furthering the interests of Jehovah's Witnesses in preference to her family. The trial court had before it the parties involved and was able to judge of their appearance. It was in a much better position to judge of the welfare of the children than is the appellate court. It is settled law in this state that the finding of the trial court on this question will not be



disturbed on appeal unless the evidence in support thereof is so slight as to indicate a want of the ordinary good judgment and an abuse of discretion by the trial court. *MacDonald v. MacDonald*, 155 Cal. 665, 670, 102 P. 927, 25 L.R.A.,N.S., 45. Whether in any given case there has been inflicted "grievous mental suffering" is a question of fact to be deduced from all the circumstances of each particular case. A correct decision must depend upon the sound discretion and judgment of juries and courts. *Barnes v. Barnes*, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; *Taber v. Taber*, 209 Cal. 755, 290 P. 36. The evidence supports the findings and the findings support the judgment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



58 Cal.App.2d 667

ROBERTSON et al. v. HYDE et al.  
Civ. 12329.

District Court of Appeal, First District,  
Division 1, California.

May 21, 1943.

Hearing Denied July 19, 1943.

#### 1. Paupers ⇨43(2)

Where vendor conveyed land and had note secured by deed of trust which named son as beneficiary executed for the purpose of apparently qualifying for old age assistance, the transaction between vendor and son violated the statute relating to old age assistance. *St.1937*, pp. 1079, 1085, §§ 2007, 2163, 2164.

#### 2. Contracts ⇨103, 139

Generally, a contract founded upon an illegal consideration or which is made for the purpose of doing anything prohibited by statute or is intended to aid or assist any person therein is void, and where the contract for payment still remains executory, relief should be granted at least the innocent party thereto who repudiates such contract because of the illegality.

#### 3. Contracts ⇨140

Where vendor conveyed land and had note secured by deed of trust which named

son as beneficiary executed for the purpose of apparently qualifying for old age assistance, transaction between vendor and vendees was not "illegal per se" so as to permit rescission of obligation on the note and retention of property purchased, where only illegality was in transaction between vendor and son, which was separate from the sale. *St.1937*, pp. 1079, 1085, §§ 2007, 2163, 2164.

See Words and Phrases, Permanent Edition, for all other definitions of "Illegal Per Se".

#### 4. Contracts ⇨259

Where vendor had note secured by deed of trust naming son as beneficiary executed for purpose of apparently qualifying vendor for old age relief, such fact did not permit vendees who were not defrauded, to rescind obligation on note and retain property on ground that statute prohibiting such a transfer for old age assistance qualifications made sale illegal, where purpose of statute would be defeated, in that whatever rights state might have in such property for the reimbursement of amounts of which it had been defrauded would be defeated. *St.1937*, pp. 1079, 1085, §§ 2007, 2163, 2164.

#### 5. Contracts ⇨140

The mere fact that a transaction is connected with another transaction illegal as result of violation of the statute will not render the collateral transaction illegal.

#### 6. Contracts ⇨138(1)

If refusal to enforce or rescind an illegal contract would produce a harmful effect on parties for whose protection the law making the contract illegal exists, enforcement or rescission, whichever is appropriate, is allowed.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Proceedings by Elmer E. Robertson and Harriet A. Robertson against L. F. Hyde, Alameda County, East Bay Title Insurance Company, and Sarah C. Hyde, to cancel a promissory note secured by a deed of trust, allegedly constituting a cloud on the title of certain real property, and to recover a sum paid on the promissory note. Judgment for defendant and plaintiffs appeal.

Judgment affirmed.

James H. Boyer, of Oakland, for appellants.

Albert K. Whitton and Raymond A. Ferrario, both of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiffs appeal from a judgment for defendants entered after the trial court sustained defendants' general demurrer to an amended complaint without leave to amend. The amended complaint purported to set forth two causes of action. The first prayed for the cancellation of a promissory note for \$2,773.50 secured by a deed of trust, which it is alleged constituted a cloud on the title of plaintiffs to certain real property previously purchased by plaintiffs from defendant Sarah C. Hyde. The second cause of action was to recover \$420.88 which plaintiffs had previously paid on the promissory note. The trial court was of the view that plaintiffs had no cause of action under the facts alleged.

So far as pertinent to the present controversy, the complaint alleged the following facts:

Defendants Sarah C. Hyde and L. F. Hyde are mother and son, the mother being over seventy years of age. In August, 1939, Sarah C. Hyde owned certain real property in Oakland. On August 1, 1939, she sold and conveyed that realty to plaintiffs, causing them to execute their promissory note for \$2,773.50 as part of the purchase price, which note was secured by a deed of trust on the property in question. The note was made payable to L. F. Hyde and he was named beneficiary of the deed of trust. The note and deed of trust were made out to the son of Sarah C. Hyde for the purpose of enabling Sarah C. Hyde to qualify for old age assistance from the state, to which she was not entitled, by making it appear that she owned no real property having a value in excess of \$500. This transfer to the son of the note and deed of trust was voluntary and without consideration passing from the son to the mother, and was made solely for the purpose of making it appear that the mother was eligible for old age payments from the state. This transaction was entered into by defendants "for the purposes and with the intent of perpetuating a fraud on the State of California." The Board of Supervisors of Alameda County had no knowledge of such voluntary transfer and at no time

consented to the same. Plaintiffs had no knowledge of the fraudulent purpose and intent of the defendants and did not discover such intent until December 1, 1941, when they immediately repudiated and disaffirmed the contract. Sarah C. Hyde applied for old age benefits, and, in doing so, falsely represented to the authorities that she had not made any voluntary transfer of property for the purpose of apparently qualifying for such aid. On these allegations it is plaintiffs' theory that they are entitled to have the note and deed of trust canceled, are entitled to a refund of the \$420.88 paid on the note, and are entitled to keep the property free and clear of any claim of defendants. It is their contention that the instruments in question were made out to the son in pursuance of an illegal aim and purpose on the part of defendants; that they are consequently illegal and void; and that plaintiffs have a right to be relieved of the obligations thereunder and to a return of the payments made.

[1] It is true that the transaction as described in the complaint between Mrs. Hyde and her son was in violation of the law. Section 2160 of the Welfare and Institutions Code, as it read in 1939, St.1937, p. 1083, limited old age relief to citizens of the age of sixty-five years or more, with certain residential requirements "who has not made any voluntary assignment or transfer of property for the purpose of qualifying for such aid." Section 2163 of that code, St.1937, p. 1085, provided that an applicant was not entitled to aid if he owned personal property of a value in excess of five hundred dollars, while § 2164 provided that aid would not be granted any applicant who owned real property of the assessed value of \$3,000 or more. On August 1, 1939, the date of the alleged transfer to the son, § 2007 of the Welfare and Institutions Code, St.1937, p. 1079, provided that it was a misdemeanor for anyone applying for old age relief to make any false statement or to use any fraudulent device in order to obtain an old age pension, or for anyone to aid or abet such practices. Section 2008 then provided that anyone who knowingly violated any provision of the pension law for which no penalty was otherwise provided was guilty of a misdemeanor.

[2] Appellants, citing such cases as *City of Los Angeles v. Watterson*, 8 Cal.

App.2d 331, 48 P.2d 87; *Asher v. Johnson*, 26 Cal.App.2d 403, 79 P.2d 457, and *City of Oakland v. California Const. Co.*, 15 Cal.2d 573, 104 P.2d 30, contend that it is the law that a contract founded upon an illegal consideration, or which is made for the purpose of doing anything prohibited by statute, or is intended to aid or to assist any person therein, is void. They also maintain that where, as here, the contract for payment still remains executory, relief should be granted at least the innocent party thereto who repudiates such contract because of the illegality. *Schmitt v. Gibson*, 12 Cal.App. 407, 107 P.2d 571; *National Stone Tile Corp. v. Vooheis*, 93 Cal.App. 738, 270 P. 286; *Glos v. McBride*, 47 Cal.App. 688, 191 P. 67; *Woods v. Kern County Mut., etc., Ass'n*, 34 Cal.App. 2d 468, 93 P.2d 837. These cases undoubtedly establish the general principles for which they are cited, and apply those principles to the facts of the cases there presented. None of the cases cited, however, on their facts, is in any way comparable to the instant case.

Appellants place their chief reliance on the cases involving the rescission of agreements made to circumvent the provisions of the Home Owners Loan Act, 12 U.S.C.A. § 1461 et seq. In those cases the creditor, after having voluntarily accepted the payment of the encumbrance on the terms specified by the Home Owners Loan Corporation, had the mortgagor-owner execute obligations secured as second encumbrances on the property. The courts, quite uniformly, have allowed the mortgagor-owner to avoid the second encumbrance and to recover back payments made thereon. *McAllister v. Drapeau*, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800; *Woods v. Kern County Mut., etc., Ass'n*, 34 Cal.App. 2d 468, 93 P.2d 837; *Morrison v. Landers*, 56 Cal.App.2d 665, 133 P.2d 34; *Rockwood v. Brown, etc., Invest. Co.*, 51 Cal. App.2d 241, 124 P.2d 612. The rule of those cases is not here controlling. Those cases involved a statute that was passed for the main purpose of protecting small home owners who were unable to meet their obligations, and faced the loss of their homes. The obtaining of secret second liens by the creditors violated the basic public policy expressed in the act. It was held that the home owners were not in *pari delicto*, because as compared with the creditors they were only slightly at fault, and, moreover, they were not free agents,

acting as they did under the threat of foreclosure. A second ground of these decisions was that in accepting payment from the Home Owners Loan Corporation the creditor entered into an accord and satisfaction of the original indebtedness, so that there was no consideration for the obligation secured by the second lien.

[3] It is to be noted that in these cases the relatively innocent home owner was seeking to be relieved from the illegal transaction into which he had been forced by the creditor. That is not the situation here presented. In this case there was nothing illegal per se in the transaction between Sarah C. Hyde and the appellants. That transaction violated no law. Mrs. Hyde had the legal right to sell the property and appellants had the legal right to buy. The illegality alleged did not involve the appellants at all. It consisted in the alleged voluntary transfer of the note and deed of trust by Mrs. Hyde to her son for the purpose of apparently qualifying for old age relief. That phase of the transaction, although entered into at the same time as the sale transaction, was separate and distinct from the sale transaction.

[4] The position of appellants in this action is somewhat anomalous. They are seeking to rescind the obligation on the note, and yet retain the property which they purchased. In fact, they contend that they are not only entitled to this relief but also to a refund of all payments made on the note. Thus, appellants contend that respondents must suffer the loss of the note and deed of trust and the loss of the property. Such a holding would defeat the very purpose of the statute. In the present case it does not appear in the pleading whether Mrs. Hyde was successful or not in her attempt to secure the pension, but, obviously, so far as appellants are concerned, the same rule must be applied whether the attempt to defraud the state is successful or unsuccessful. The statute defines those eligible for relief. The legislature has provided that only those who do not own property of a designated value shall be eligible. Pursuant to that policy it has prohibited voluntary transfers for the purpose of qualifying for the pension, and has made violation of the act a misdemeanor. Just what other remedies were available to the state when this transaction was entered into where such voluntary transfer was made, need not be here



determined. Whether, as the law then existed, the state itself could set aside such a transfer, or whether the state had a lien on such property illegally transferred, are problems not here involved. But, if the purchaser of the property can avoid his obligation and retain the property, whatever rights the state might have in such property for the reimbursement of amounts of which it has been defrauded would be defeated. There is no allegation here that appellants were defrauded, or that the transaction as to them was not fair and equitable. Appellants are simply attempting to take advantage of a statute not passed for their benefit so as to escape their just obligations and to retain all the benefits.

[5] The transaction between Sarah C. Hyde and the appellants, as already pointed out, was not per se illegal. It was connected with the allegedly illegal voluntary transfer to her son. It is not the law that every transaction connected with an illegal transaction is itself illegal. Each case must turn on its own facts. The purpose of the statute which has been violated must be considered. In that connection, the court should consider whether a holding that the collateral transaction is illegal will tend to assist or defeat the main purpose of the statute. In the instant case, as already pointed out, to hold that the collateral agreement (the sale to appellants) is illegal would tend to defeat the main purpose of the statute in that it would effectually prevent the state from recovering any sums of which it has been defrauded.

[6] This principle is stated in § 601 of the Restatement of Contracts as follows: "If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed." Many illustrations are given in the Restatement of this principle. Thus, illustration 1 is as follows: "A, a bank, is forbidden by statute to invest in real estate mortgages, and the statute makes it criminal to do so. A, nevertheless, invests in such mortgages. Action can be maintained on the mortgage debt and to foreclose the mortgage, since otherwise the creditors and shareholders of the bank for whose protection the statute is enacted, would be injured." Cases illustrating this principle in this state are

*Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 P. 84, 71 Am.St.Rep. 58; *Savings Bank v. Burns*, 104 Cal. 473, 38 P. 102.

The court must also consider the connection between the illegal transaction and the transaction sought to be avoided. How closely a transaction must be connected with an illegal purpose in order to render the collateral transaction illegal is a question of degree. This principle is set forth in § 597 of the Restatement of Contracts. As an example of the application of the principle, illustration No. 3 states: "A and others enter into an illegal combination in restraint of trade. A sells to B, who is not a party to the combination, goods of the kind to which the illegal restriction relates. The sale is not illegal and A can recover the price."

These principles are conclusive on this appeal.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



58 Cal.App.2d 636

**UNION OIL CO. OF CALIFORNIA v.  
JOHNSON, State Treasurer.**  
Civ. 12447.

District Court of Appeal, First District,  
Division 2, California.

May 20, 1943.

Hearing Denied July 15, 1943.

#### 1. Licenses ☞29

Where taxpayer, which both produced and purchased crude oil, intermingling the two and refining the oil so commingled, consumed in its own business about 4 per cent. of refined products so produced, taxpayer was required to pay retail sales tax on that portion of its refined products so used by itself which was equal to proportion that purchased crude oil bore to total crude oil refined. St.1933, p. 2604, § 17.

#### 2. Common law ☞9

Legal fictions will not be adopted unless they are consistent with all relevant facts and circumstances and do equity.

3 States 4

Statutes 219

A departmental regulation of federal internal revenue bureau cannot control operation or construction of state tax law.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Union Oil Company of California against Charles G. Johnson, as Treasurer of the State of California, to recover back retail sales tax paid under protest. From a judgment denying recovery, the plaintiff appeals.

Affirmed.

L. A. Gibbons, Jerry H. Powell, and Douglas C. Gregg, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

DOOLING, Justice pro tem.

Plaintiff is in the business of producing and refining crude oil and selling the refined products. In the course of its business it both produces and purchases crude oil, intermingles the two and refines the oil so commingled.

Between August 1, 1933, and June 30, 1935, plaintiff produced 22,681,553 barrels of crude oil and purchased 24,197,006 barrels. Of the refined products of the commingled oil so purchased and produced plaintiff used and consumed in its own business about 4%. The state board of equalization determined that a sales tax was due from plaintiff on that proportion of its refined products so used by itself which was equal to the proportion that the purchased crude oil bore to the total crude oil refined. Plaintiff paid this tax under protest and sued to recover it back. From a judgment denying recovery this appeal is taken.

Under the California Retail Sales Tax Act (Stats.1933 p. 2599), plaintiff gave to the sellers from whom it purchased crude oil the certificates, provided for in sec. 17 (Id. p. 2604), that such crude oil was purchased by plaintiff for resale. As a result no sales tax was paid thereon at the times of such purchases.

The theory on which the tax was collected is that by intermingling the pur-

chased oil with the oil produced by itself and refining the mixture plaintiff used and did not resell a portion of the crude oil purchased under such certificates. That this is true as a matter of fact plaintiff does not dispute nor, if the tax was properly assessed as a matter of law, does it question the propriety of the manner of its calculation. Plaintiff's sole contention on this appeal is that because it intended to use only the refined products of the crude oil produced by itself and intended to resell all of the refined products of the crude oil which it had purchased from others, such intention should be given controlling weight and no tax collected from it for the portion of the refined products of the oil purchased by it which it did in fact use and consume.

To simplify its claim, plaintiff admits that if the crude oil purchased by it had been separately refined and it had used a portion of such refined products it would be liable for a tax thereon, but it denies that where the refined products are produced from a mixture of such purchased oil with oil produced by itself it is liable for a tax upon the part of the refined products which are produced from purchased oil.

[1] We do not believe that plaintiff can escape the tax by any such refinement of reasoning. The incidence of the tax is made to fall on the purchaser by reason of the fact that he consumes and does not resell property purchased for resale. Plaintiff's intent, which it is impossible for it physically to carry into execution, cannot change the fact that it has actually consumed and has not resold a part of the crude oil which it purchased for resale. On that part which it has consumed the law imposes the tax.

Plaintiff relies upon certain authorities all of which are distinguishable.

Peoples Natural Gas Co. v. Public Service Comm., 270 U.S. 550, 46 S.Ct. 371, 373, 70 L.Ed. 726, was a case where gas purchased in West Virginia was conveyed by pipe to Pennsylvania and there mingled with gas produced in Pennsylvania. The mixture was delivered in continuous flow to the consumers. An order of the Public Service Commission of Pennsylvania compelling the plaintiff to continue serving a Pennsylvania community was attacked on the ground that it interfered with interstate commerce. The court held that while the West Virginia

gas was in interstate commerce the Pennsylvania gas was not. "Of course", said the court, "after the commingling, the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

[2] It is to be observed of this case that, while it did not involve a tax but a public regulation, the effect of the decision was not to defeat the regulation but to uphold it. In that case by mingling the products the plaintiff sought to evade the regulation, just as here by mingling the products the plaintiff seeks to avoid the tax. The Supreme Court adopted a fiction in that case to uphold a proper public regulation, but as plaintiff points out in the opening brief: "It is a well-known rule that legal fictions will not be adopted unless they are consistent with all relevant facts and circumstances and do equity. 25 C.J. 1086; 10 Cal.Jur. 743; *United States v. 1960 Bags of Coffee*, 8 Cranch. 398, 415, 3 L.Ed. 602; *Hibberd v. Smith*, 67 Cal. 547, 561, 4 P. 473, 8 P. 46, 56, Am.Rep. 726; *MacDonald v. Reich & Lievre, Inc.*, 100 Cal.App. 736, 741, 281 P. 106; *Pacific Nat. Bank of San Francisco v. Corona Nat. Bank*, 113 Cal. App. 366, 374, 298 P. 144; *In re Walter J. Schmidt & Co., D.C.*, 298 F. 314, 316; *Mitchell v. Dunn*, 211 Cal. 129, 294 P. 386; *Leabell v. Blades*, 237 Mo. 695, 141 S.W. 893."

In this case it is plaintiff who asks us to indulge a legal fiction: that it did not use products manufactured from purchased oil, although it did in fact do so; and it is asking us to indulge the fiction to avoid a tax which the fact imposes upon it.

In *Helvering v. Rankin*, 295 U.S. 123, 55 S.Ct. 732, 735, 79 L.Ed. 1343, a purchaser of shares of stock which were not identified by any specific certificates, but were held in the name of a broker or in street names in a common pool, instructed his broker to sell a number of shares purchased by him at a particular time. The court held that this designation was sufficient to fix those specific shares as the ones sold for federal income tax purposes, as against the "first-in, first-out" rule of the commissioner of internal revenue. The court pointed out

that: "It is true that certificates provide the ordinary means of identification. But it is not true that they are the only possible means." Here the court was dealing with choses in action, not tangible property. The choses in action were identifiable and the particular ones sold were actually identified. The result of the transaction was to cancel the obligation of the broker to deliver the shares of stock purchased on a particular day as a result of a particular order of the customer and to substitute an obligation to pay the customer the price at which that stock was resold. That this was no fiction, but legal fact, is obvious. For example in case of failure to deliver the balance of the stock, upon suit of the purchaser if the statute of limitations had run as to earlier transactions he could not, to avoid the bar of the statute, repudiate his designation and seek to recover on the obligation to deliver the particular stock which he had ordered sold.

As further demonstration that the basis of this decision is the change in legal relations as to the particular chose in action is the holding in the cited case, and in the companion case of *Snyder v. Commissioner*, 295 U.S. 134, 55 S.Ct. 737, 79 L.Ed. 1351, that the mere intention of one selling such stock to sell shares purchased at a particular time is not sufficient to effect such purpose where not communicated to the broker.

Nor, where the stock is evidenced by separate certificates, does the intention even when the broker is directed to carry it out, control if the broker in fact transfers another certificate (*Davidson v. Commissioner of Internal Revenue*, 305 U.S. 44, 59 S.Ct. 43, 44, 83 L.Ed. 31), the court in that case saying: "The commissioner rightly computed gain on the basis of what was done rather than on what petitioner intended to do."

Finally plaintiff relies on a ruling of the U. S. Bureau of Internal Revenue (Ruling ST 679, Cumulative Bulletin XII-1, p. 442) dealing with oil in pipe lines for export. The effect and basis of this order are found in the following quotation: "The fact that the shipper is unable to identify, during the movement, the particular units of oil which are to be exported, does not destroy the export character of the shipment. \* \* \* Even though \* \* \* the oil \* \* \* cannot be identified as the oil actually de-



livered to the foreign customer, nevertheless the exemption will apply if it can be shown that, pursuant to the foreign order, the shipper tendered the oil called for in such order for transportation to such foreign customer, and that the oil so tendered was actually transported by pipe line, and reached the port of exportation on a continuous movement prior to the time that an equivalent amount and grade of oil was actually delivered to the foreign customer."

[3] A mere departmental regulation of a federal bureau cannot control the operation or construction of a tax law of this state. Furthermore it is evident that while it is impossible to segregate oil in a pipe line so as to say that this particular oil was actually exported, it is possible to know exactly how much oil passing through the pipe line was exported, and the exclusion of that quantity from the oil to be taxed clearly results in the tax being imposed upon all oil not exported from the country.

No amount of mental legerdemain can change the fact that plaintiff did consume, and did not resell, a portion of the crude oil purchased by it for resale. Upon the portion so consumed the board of equalization properly assessed the tax, acting (to quote again from Davidson v. Commissioner, supra) "on the basis of what was done rather than on what petitioner intended to do."

Judgment affirmed.

NOURSE, P. J., and SPENCE, J., concur.

Hearing denied; TRAYNOR, J., not participating.



**In re LUCAS' ESTATE.\***

**FEW v. BROWN.**

Civ. 13906.

District Court of Appeal, Second District,  
Division 1, California.

May 25, 1943.

Rehearing Denied June 24, 1943.

See 138 P.2d 803.

**1. Executors and administrators** ⇨269

The probate court was without jurisdiction to direct public administrator to

\* Subsequent opinion 144 P.2d 340.

compromise a claim barred by limitations. Probate Code, § 708.

**2. Executors and administrators** ⇨269

Where creditor objected to public administrator's petition to compromise action upon claim barred by limitations, and never formally withdrew objections, though order granting such petition recited that no objection was made, and letter by creditor's counsel indicated possible disposition to approve the compromise but unwillingness to waive rights, creditor was not "estopped" from objecting to approval of administrator's final account. Probate Code, § 708.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

**3. Executors and administrators** ⇨269

Where circumstances showed possibility that disputed claim against estate was barred by limitations, probate court could not approve the claim or direct a compromise thereof without determining question of limitations. Probate Code, § 708.

**4. Constitutional law** ⇨70(1)

Power to nullify acts of the legislature prescribing limitation of actions is not a judicial prerogative.

**5. Limitation of actions** ⇨1

Statutes of limitation are "rules of property" and "statutes of repose", and are favored by the law.

See Words and Phrases, Permanent Edition, for all other definitions of "Rule of Property" and "Statute of Repose".

**6. Executors and administrators** ⇨213

It is duty of probate courts to guard the interests of heirs and creditors, and especially should administrators and courts reject outlawed claims. Probate Code, § 708.

**7. Executors and administrators** ⇨213

An executor may not waive either general statute of limitations or failure to present claim against the estate, nor can executor or judge having jurisdiction allow a barred or unrepresented claim. Probate Code, § 708.

**8. Executors and administrators** ⇨269

An order directing compromise of a claim that was barred by limitations was "void upon its face," and did not preclude creditor of the estate from objecting to al-

allowance of credit for the compromised claim in public administrator's final account. Probate Code, §§ 708, 718.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Void Upon its Face".

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Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Proceeding in the matter of the estate of Nelia Lucas, deceased, wherein Ben H. Brown, public administrator, filed final account, opposed by George Few. From an order settling and approving the final account, George Few appeals upon the judgment roll.

Reversed.

Edgar T. Fee, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order of the probate court settling and approving the final account of the public administrator as administrator of the estate of Nelia Lucas, deceased. The appeal is taken upon the judgment roll; and the argument of appellant here is based upon the contention that the final account of the administrator included the allowance of a claim barred by the statute of limitations at the time of its presentation. It was stipulated by the parties that respondent might file herein a supplemental clerk's transcript to include the petition of the administrator for instructions to determine whether a compromise of the claim in question should be accepted, the objections thereto filed on behalf of appellant, the order granting such petition, and certain exhibits introduced at the time of the hearing of the first and final account of respondent.

Appellant, as administrator of the estate of Eliza Jacobs, deceased, is a judgment creditor of the deceased, Nelia Lucas, with a claim based on said judgment duly filed against her estate and approved by the administrator. The claim in dispute herein is based upon a note and mortgage executed by A. J. Lucas and Nelia Lucas on February 1, 1928, and was filed against the estate of Nelia Lucas by the executor of the deceased mortgagee. Upon the filing of the claim in question it was re-

jected by the administrator of the estate of Nelia Lucas. Suit on said note and mortgage was then instituted, in which action the administrator of the estate of Nelia Lucas interposed a demurrer to the complaint on the ground that the action was barred by the statute of limitations. Before this demurrer was heard the administrator of the estate of Nelia Lucas petitioned the probate court for instructions regarding an offer of compromise of the claim in question; and appellant interposed objections to the allowance of this petition. The probate court granted the petition of the administrator (respondent herein) and ordered and directed him to enter into an agreement with the executor of the deceased mortgagee to secure the release of the note and mortgage and the dismissal of the action thereon, and to clear the title to the premises covered by said mortgage, upon the payment to said executor of the sum of \$500 through escrow upon sale of the property or in such other manner as may be agreed upon by respondent petitioner and said executor. Appellant did not take an appeal from the order of the probate court allowing a compromise of the disputed claim; but instead has appealed herein from the order settling and approving the final account of the administrator, which account, as already stated, includes the allowance of the compromise.

[1] Respondent makes no contention that the claim in dispute was not barred by the statute of limitations, or that such question was determined in the proceedings below; but confines his argument chiefly to the point that, no appeal having been taken from the order directing the administrator to pay \$500 by way of compromise of the claim in question, the order directing such compromise has now become final, is conclusive, *res judicata*, and the law of the case. The defect in this argument is revealed through consideration of section 708 of the Probate Code. Section 708 reads: "No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge. When a claim is presented to a judge for his allowance or approval, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. No claim which has been allowed is affected by the statute of limitations, pending the administration of the estate." It follows from the quoted section of the code that the probate-

court was without authority or jurisdiction to direct the compromise of the claim in the manner here shown by the record.

The question of the bar of the statute of limitations was, according to the record, duly raised by appellant. This question, touching upon the validity of the claim, does not appear from the record to have ever been determined in the proceedings below. The claim was first rejected by the administrator, suit was brought thereon by the claimant, in which action the administrator himself raised by demurrer the question of the bar of the statute; but before any question was determined in that suit an offer of compromise was made, the administrator petitioned the probate court for instructions and the court directed the acceptance of the compromise, apparently without passing upon the validity of the claim in question.

[2] It should be noted that although appellant interposed objections to the allowance of the petition to compromise the action upon the claim, the order granting such petition recites that no objection to said proposal was made. It does not appear that the objections thus interposed were ever formally withdrawn; though a subsequent letter written by counsel for appellant to counsel for the administrator and respondent, and incorporated in the supplemental transcript, might indicate a possible disposition to approve the compromise, were it not for the fact that the letter also indicates an unwillingness to waive any rights in the matter. The record here presented furnishes no ground for holding appellant estopped; and the circumstance mentioned is immaterial.

[3] It is sufficient to note that the record reveals a proceeding upon the claim not in accord with the provisions of section 708 of the Probate Code, and hence a proceeding which the court was not authorized to follow. It appears that circumstances disclosed a possibility that the disputed claim was one barred by the statute of limitations; and the question was directly presented to the probate court. Under such circumstances, the probate court could not properly proceed to approve the claim or direct a compromise thereof without first passing upon the validity of the claim by determining the question of the application of the statute of limitations.

[4-7] "The power to nullify acts of the Legislature prescribing a limitation upon

the time within [which] actions may be commenced is not a judicial prerogative. Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored by the law. *Nichols v. Randall*, 136 Cal. 426, 69 P. 26; *Shain v. Sresovich*, 104 Cal. 402, 38 P. 51. They are to be viewed as statutes of repose, and as such constitute meritorious defenses. *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 106 P. 715, 21 Ann.Cas. 1279.

\* \* \* It is the duty of probate courts to guard the interests of heirs and creditors. So zealous is the law of their interests that it specially enjoins upon administrators and courts the duty to reject and disallow outlawed claims." *Fontana Land Co. v. Laughlin*, 199 Cal. 625, at page 636, 250 P. 669, at page 664, 48 A.L.R. 1308. "With all the safeguards given by the law, and with due care upon the part of executors, administrators, and the court, experience has proven that estates are often plundered by unjust claims. The safest course is to follow the substantial requirements of the statute." *Etchas v. Orena*, 127 Cal. 588, at page 594, 60 P. 45, at page 47. An executor is not permitted to waive either the general statute of limitations or the failure to present a claim against the estate, nor can he or the judge of the court having jurisdiction of the estate allow a barred or unrepresented claim. *Estate of Cates*, 195 Cal. 319, 232 P. 972 (language taken from the syllabus). "The claim of plaintiff was barred by the statute of limitations. The administrator is prohibited from allowing or paying any claim which is barred. To waive the objection here would be to allow such a claim to be collected. In other words, the administrator would be voluntarily paying a claim which is barred. No such consent could be given so as to bind the estate." *Vrooman v. Li Po Tai*, 113 Cal. 302, at page 306, 45 P. 470, at page 472. See also *Reay v. Heazelton*, 128 Cal. 335, 60 P. 977. "Although the respondent admitted that the claims were barred and offered no proof in support of them, they were allowed by the court. This is clearly error. Such claims should not be allowed." *Estate of Aldersley*, 174 Cal. 366, at page 375, 163 P. 206, at page 209. See also *Jacobson v. Mead*, 12 Cal.App.2d 75, at page 79, 55 P.2d 285, 1267, in the concurring opinion of Mr. Presiding Justice Crail.

*Fontana Land Co. v. Laughlin*, supra, was a case wherein an administratrix of an estate had commenced an action on be-



half of said estate against the holder of a past due mortgage on property of the estate, praying for a decree quieting title to the real property in the administratrix. The debt secured by the mortgage had become outlawed, but the trial court had entered an interlocutory decree holding that the administratrix was not entitled to have title to the property quieted in her favor except upon the payment of the amount which the court found due upon said mortgage. Of this situation the Supreme Court said, at page 638 of 199 Cal., at page 674 of 250 P., 48 A.L.R. 1308: "The refusal to allow barred claims is more than a general policy of the law; it is the positive command of the statute. The mortgage indebtedness showed upon its face and it was apparent upon the public records of the county \* \* \* that it was barred long prior to the first assignment \* \* \*. If the statute was effective for any purpose it would seem to furnish an answer to the resistance made by the defendants in the first action brought by the administrator to quiet title. The first purported interlocutory decree shows upon its face that it was void. *The court was without authority or jurisdiction to make it, inasmuch as it compelled the recognition of a claim proscribed by statute.* If respondent's contention be accepted as the true rule, barred claims not presented for allowance or rejection could be used to defeat the closing of estates, and real property belonging thereto would become inalienable. This would be indulging mere subterfuges to defeat the plain letter of the statute. It would also place the creditors of an estate who had been vigilant on no better terms than those who had been guilty of gross laches, and, if barred claims are to be paid prior to or as a condition to the right of the administrator to sell real property, persons chargeable with negligence would be in a position to defeat the just claims of the vigilant." (Italics added.)

The fact that the claim in the Fontana Land Co. case had never been presented for approval or rejection furnishes no basis for distinction between that case and the one at bar. The rule applies in either case. Though an administrator or executor may not waive the statute of limitations on a barred claim, may he, after suit instituted thereon, compromise the claim? To answer in the affirmative is to arrive at an absurdity. If a barred claim may not be paid, how can it be compromised? And,

by the same token, if it is made apparent to the court that the claim in dispute may be one barred by the statute of limitations the court would not be justified in approving any compromise of such a claim until the question of the limitation of time had been first determined. In the case at bar the question of the statute of limitations had been raised by demurrer to a complaint in an action upon the rejected claim, yet the probate court approved a compromise of the claim before the demurrer had been heard and the question of the bar of the statute had been determined. To compromise such a claim without determining its status constituted an abuse of the court's discretion in the matter, even if it be assumed that the court had any jurisdiction so to act.

The provisions of section 718.5 of the Probate Code, giving the executor or administrator power to compromise claims with the approval of the court, are necessarily limited by the provisions of section 708, supra. Obviously, if the court cannot allow or approve a claim barred by the statute of limitations, there can be no power in the court to approve the compromise of a claim so barred. To hold otherwise would be to provide a convenient subterfuge for the payment of barred claims, thus evading the effect of section 708, supra.

[8] Under the circumstances here presented, it was mandatory upon the probate court to determine the question of whether the disputed claim was barred, before allowing a compromise thereof; and until that question was determined the court was without jurisdiction to direct a compromise of the claim. Any other rule would open the door to fraud and collusion in the settlement of disputed claims against estates and prejudice the rights of heirs and creditors. In view of the record upon which it was granted, the order directing the compromise of the claim was void upon its face; and appellant was not thereby precluded from raising an objection to the allowance of a credit for the compromised claim in the final account of the administrator.

The order settling and approving the final account of the administrator herein is reversed, appellant to have costs on appeal.

YORK, P. J., and WHITE, J., concur.

**SLATER v. SHELL OIL CO. et al.**

Civ. 12305.

District Court of Appeal, First District,  
Division 2, California.

May 28, 1943.

Hearing Denied July 26, 1943.

Rehearing Denied June 26, 1943.

**1. Judgment ⇨713(2)**

The doctrine of "res judicata" applies not only to matters actually tried and determined in former action, but to every matter which might have been urged in support of the claim in litigation.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

**2. Judgment ⇨582, 589(1)**

In applying doctrines of "res judicata", "estoppel by judgment", and "merger of judgments", it is immaterial what form the proceedings take so long as they arise out of the same act or right.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel by Judgment" and "Merger of Judgments".

**3. Trespass ⇨51**

Where plaintiff's cause of action is based upon alleged invasion and occupancy of his land by defendant, plaintiff may elect to treat the occupancy as permanent and sue for compensation, once for all, for prospective invasions.

**4. Trespass ⇨51**

Compensation for permanent occupancy of land is usually fixed at depreciation in salable value of the land.

**5. Election of remedies ⇨15**

Rights to sue for ejectment and for damages are independent and inconsistent causes of action based upon the same invasion of the same right, so that a party electing to sue for damages past and prospective is deemed to have waived the invasion and consented to continued occupancy of the land. Code Civ.Proc. § 427, subd. 2.

**6. Judgment ⇨585(2)**

Where landowner sued oil company for use and occupation and damages committed by installing pipe line, and obtained verdict for \$10,000 as market value of the property plus \$2,500 as damages for physical injury, but in order to avoid new trial

waived the judgment in excess of \$2500, and the reduced judgment was satisfied after being upheld by appellate court, landowner could not maintain subsequent ejectment action to enforce removal of the pipe line and for damages for use and occupation.

**7. Election of remedies ⇨1**

The doctrine of "election of remedies" is an extension of the law of estoppel.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies".

**8. Judgment ⇨582**

"Merger of judgments" is an application of the doctrine of estoppel.

**9. Judgment ⇨540**

"Res judicata" has many of the features of "estoppel", particularly when based upon the same cause of action.

**10. Judgment ⇨590(1)**

One who has had his day in court should not be permitted to further vex his adversary by a subsequent action for the same relief.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action in ejectment by Gertrude Slater against the Shell Oil Company and others in ejectment to enforce removal of pipe line, and for damages for use and occupation. From an adverse judgment, plaintiff appeals.

Affirmed.

Burns & Lawless, of San Francisco (James A. Himmel, of San Francisco, of counsel), for appellant.

McCutchen, Olney, Mannon & Greene, F. F. Thomas, Jr., and Sherrill Halbert, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in ejectment to enforce the removal of defendant's pipe line from the property of plaintiff, and for damages for the use and occupation of the land. The defendant answered and pleaded two separate defenses—that a former action between the same parties and upon the same subject matter bars this action, and that all damages for the use and occupation of plaintiff's land having been paid for by the satisfaction of the former judg-

ment, plaintiff is barred from seeking further relief in this action for the same injury.

Under the provisions of section 597 of the Code of Civil Procedure a separate trial was had upon these defenses and the trial court found that the former action was a bar upon the second cause of action; that the plaintiff therein waived all portions of the judgment and verdict in excess of \$2500; that the satisfaction of the judgment for that amount "constitutes the entire relief to which plaintiff is entitled" and bars this action, or any further actions with respect to the cause of action herein asserted; and that, through the satisfaction of the former judgment, "plaintiff has been fully compensated for the continued and permanent maintenance and operation of said pipe line". Judgment followed for the defendant on these special pleas.

The single question raised on the plaintiff's appeal from this judgment is whether the trial court erred in holding that her action was barred by the former judgment. It is her contention that since the former action was one in trespass for damages for the use and occupation of plaintiff's land, and for damages in the installation of the pipe line, it has no relation to this suit in ejectment which seeks restitution of the land and removal of the pipe line. Respondent replies that the statement of the issues is too narrow—that the former action sought damages for the construction and maintenance of the pipe line, in addition to the claim of damages during its construction to physical properties. Respondent also points out that the present action is not confined to the demand for possession and removal of the pipe line, but it also seeks damages for its construction and maintenance.

A portion of the record of the former trial is included in the bill of exceptions. From this it appears that the complaint therein pleaded the unlawful entry upon the premises by defendant for the installation, construction and maintenance of the pipe line, that these acts caused damage to and decreased the value of the property by rendering it unfit for subdivision purposes, by injuring crops and trees, by creating a menace to the plaintiff and her family when oil should escape, or become overheated, and by depreciating "the reasonable value of the use of the said property of plaintiff so appropriated by defendants." The verdict of the jury in the former

action read: "We, the jury in this case, find that by reason of the construction of the second pipe line the market value of the plaintiff's property has been decreased in the sum of \$10,000.00 dollars; and we further find that the damages for the physical injury to plaintiff's property is the sum of \$2500.00 dollars."

It should be noted that, by its verdict, the jury awarded damages to the market value of the land by reason of the construction of the pipe line, and also damages "for the physical injury to plaintiff's property". Though a separate sum was fixed for each element of damage, the satisfaction was in general terms. Prior to the filing of the satisfaction the plaintiff therein filed a waiver in response to an order of the trial court that, unless she waived all portions of the judgment over \$2500 and costs a new trial would be granted. By this waiver she attempted to limit the recovery to "damages for the physical injury to the property." The trial court questioned the sufficiency of this waiver, for reasons which were apparent, and refused to direct execution. A writ of mandate was issued out of the district court of appeal ordering the trial court to direct execution on the modified judgment. *Slater v. Superior Court*, 45 Cal.App.2d 757, 115 P.2d 32, 865. The contention of the respondent in that proceeding was that the waiver was indefinite in that it appeared to limit the recovery to the damage to the physical property. But the court rejected this interpretation and said in its opinion (page 763 of 45 Cal.App.2d, page 866 of 115 P.2d) that the modified judgment for \$2,500 "constitutes a judgment for all items included within the original judgment for \$12,500. Stated another way, so far as the doctrine of res judicata is concerned, the Shell Oil Company by paying the judgment as reduced will be in exactly the same legal position as if the judgment for \$12,500 had been paid in full."

Thus there is presented on this appeal the single question whether the former judgment for injury to the market value of the property through the construction and maintenance of the pipe line is a bar, or an estoppel, to this suit in ejectment and damages for the same acts.

[1] The uncertainty of the waiver which the appellant herein denied in the mandamus proceeding is now asserted by her as indicating that the reduced judgment was satisfied only for the damages al-



lowed for physical injury to her property, and that the judgment, as satisfied, included nothing in the way of damages for decrease in the market value. We are not impressed with the argument because if she waived all damage to the value of the land caused by respondent's occupancy and the maintenance of the pipe line, she is in no better position on this appeal so far as the issue of *res judicata* is concerned. This is so because of the settled rule that this doctrine applies not only to those matters which were actually tried and determined in the former action, but to "Every matter which might have been urged in support of the cause of action or claim in litigation." 2 Freeman on Judgments, p. 1425, sec. 676; *Sutphin v. Speik*, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497. This principle is stated in a different way in Restatement of the Law of Judgments, sec. 63, comment a, as follows: "Where in the second action the plaintiff bases his claim on the same right on which he based his claim in the prior action and on the same violation of duty by the defendant, it is not a different cause of action merely because he asserts different grounds for recovery from those which he asserted in the prior action. He is barred by the prior judgment, not only where the grounds alleged in the second action were alleged in his complaint in the prior action and he failed to prove them, but also where he failed to allege these grounds in his complaint and therefore was precluded from proving them in the prior action."

[2] Some confusion is caused in the discussion of counsel from the failure to recognize the distinction between the "cause of action" and the "form of action". In the application of the doctrines of *res judicata*, estoppel by judgment, and merger of judgments it is immaterial what form the proceedings take so long as they arise out of the same act or right. In the case here the right of the appellant which she asserts in both actions is the right to be free from the alleged trespass upon her land, and the occupation by the defendant. To assert this right she could sue for the trespass and recover damages, or in ejectment and have a judgment of ouster, and damages, or for an injunction to restrain the continued occupation.

In Restatement of the Law of Judgments, sec. 63, comment b, it is said: "There is in such a case a single cause of action, based upon the *primary right* of the

plaintiff to be free from injury to his person or property. \* \* \* The plaintiff is not permitted to maintain successive actions for the *same injury* by alleging different acts of negligence on the part of the defendant." (Emphasis added.) Again in the same work, section 64, comment b, it is said: "Where, as at common law, the plaintiff in an action at law has to select one of the forms of action, and he sues in one form of action and judgment is given for him, he is precluded from maintaining an action in another form of action based on the same claim." And, in comment d, under the same section, we find: "Where a person has alternative remedies to sue either in an action of tort or in an action for restitution and has pursued one of these remedies and obtained a judgment in his favor, he cannot thereafter maintain an action to obtain the other remedy. Since the judgment terminates the right of action, it terminates also the unused remedy."

[3,4] Where the cause of action upon which plaintiff sues is based upon the alleged invasion and occupancy of his land by defendant the plaintiff may elect to treat the occupancy as permanent and sue for compensation, once for all, for the prospective invasions. This compensation is usually fixed at the depreciation in the salable value of the land. Restatement of the Law of Torts, sec. 930, comments c and d.

[5] In the early common law the action of ejectment was one to recover damages only for the wrongful ouster, or invasion. Then it was merged into the right to recover possession and to settle title and establish the right of property. By gradual development the rule was adopted permitting the owner to sue in ejectment to recover possession and, either in the same action or in another, to recover the value of the use and occupation of the land, which is termed damages for the withholding. *Johnston v. Fish*, 105 Cal. 420, 423, 38 P. 979, 45 Am.St.Rep. 53; 9 Cal. Jur. p. 1028. Though the right to sue for ejectment and damages may be exercised in the same action by reason of section 427, subd. 2 of the Code of Civil Procedure they are nevertheless independent and inconsistent causes of action based upon the same invasion of the same right. Where, therefore, a party elects to sue for damages past and prospective he is deemed to have waived the invasion and consented to the continued occupancy of the land. Such is

the rule of the majority of the cases. *Tooker v. Missouri P. & L. Co.*, 336 Mo. 592, 80 S.W.2d 691, 101 A.L.R. 365; *Thompson v. Illinois Cent. R. Co.*, 191 Iowa 35, 179 N.W. 191; *Griffen v. Jacksonville, etc., Ry. Co.*, 33 Fla. 606, 15 So. 338; 18 Am.Jur. p. 166; *Hussey v. Bryant*, 95 Me. 49, 49 A. 56; *Pinkham v. Chelmsford*, 109 Mass. 225; *Hawver v. Omaha*, 52 Neb. 734, 73 N.W. 217; *Oliver v. Monona County*, 117 Iowa 43, 90 N.W. 510; *Barnes v. Peck*, 283 Mass. 618, 187 N.E. 176; and *Great Falls Mfg. Co. v. Attorney General*, 124 U.S. 581, 8 S.Ct. 631, 31 L.Ed. 527. The rule of these cases is stated in *Tooker v. Missouri P. & L. Co.*, supra, that, since the land owner might have sued either in ejectment or for damages, and chose the latter, he must be deemed to have acquiesced in the appropriation of the right of way as a permanent and accomplished thing. For these reasons, it was said at page 695 of 80 S.W.2d, "a party will not be permitted to split his cause of action and sue for part only of the damages accrued to him out of a single transaction, and then, having recovered, vex his adversary with another suit for the remainder of the damages which he could and should have sued for and recovered in the first action."

In *Thompson v. Illinois Cent. R. Co.*, supra, plaintiff had recovered and collected a judgment for damages for the market value of his land caused by defendant's construction and maintenance of a railway embankment. He sued again for additional damages. It was held that he was bound by his election because, in the first suit, he treated the invasion as a permanent injury to his land, recovered damages based upon a substantial reduction in the market value of his land, and proceeded upon the theory "that he should be treated as having cheaper land because the permanent and wrongful construction would injure his land at future times as it had in the past." Page 197 of 179 N.W.

In *Vanderslice v. Irondale Elec., etc., Co.*, 232 Pa. 435, 81 A. 445, plaintiff endeavored to sue for additional damages, after having collected a judgment for decrease in the market value of the land. The court said, at page 446 of 81 A.: "If a party for an injury to his property elects to proceed by an action of trespass for its value, he in effect abandons his property to the wrongdoer; so that when judgment is obtained, and satisfaction made, the

property is vested in the defendant by relation as of the time of the taking or conversion."

[6] This rule is controlling here. It should be noted that this is not a suit for successive damages, or successive trespasses, under section 1047 of the Code of Civil Procedure. This is a suit based upon the same cause of action as that involved in the former judgment. Respondent has an easement for the construction and maintenance of an oil pipe line over appellant's land, and, mistakenly believing it had the right to do so, constructed a second and parallel line over the same land. Appellant, deeming herself injured by this act, sued in trespass for damages alleged to have been caused by the "installation, construction and maintenance" of the pipe line, and recovered judgment, in part, for the decrease in the "market value" of the property. The modified judgment having been fully satisfied, she must be deemed to have elected to waive the alleged unlawful entry and to permit the continued occupation of the right of way for the compensation paid under the prior judgment. She is thus barred from now asserting that the damages paid under the former judgment for the decrease in the market value were not received in full compensation for respondent's occupancy of the land.

[7-10] We purposely refrain from deciding upon what specific legal hypothesis this conclusion is reached. The respondent pleaded that the former judgment and satisfaction was a bar to this proceeding. The text writers are not in accord whether the doctrine applicable is *res judicata*, *estoppel*, *merger of judgment*, or *election of remedies*. The latter doctrine is an "extension of the law of estoppel". *Mailhes v. Investors Syndicate*, 220 Cal. 735, 738, 32 P.2d 610, 611. *Merger of judgments* is also an application of the same doctrine. *Res judicata* has many of the features of *estoppel* particularly when based upon the same cause of action. Whatever the doctrine applicable all unite in the principle that one who has had his day in court should not be permitted to further vex his adversary by a subsequent action for the same relief. *Panos v. Great Western Packing Co.*, Cal.Sup., 134 P.2d 242.

The judgment is affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concur.

58 Cal.App.2d 612

**MILLARD v. EPSTEEN et al.**

**EPSTEEN v. MILLARD et al.**

Civ. 12330.

District Court of Appeal, First District,  
Division 2, California.

May 19, 1943.

**1. Fraudulent conveyances**  $\S$ 64(1)

The question of actual intent to defraud creditors is of controlling importance in actions brought under section 3439 of the Civil Code while question of actual intent is immaterial in actions brought under section 3442. Civ.Code,  $\S\S$  3439, 3442.

**2. Fraudulent conveyances**  $\S$ 74(1)

The statutory provision that any transfer of property made without valuable consideration by party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to creditors does not apply to a conveyance made for a valuable consideration. Civ.Code,  $\S$  3442.

**3. Appeal and error**  $\S$ 994(3), 1012(1)

The credibility of witnesses and weight of their testimony are for trier of facts.

**4. Fraud**  $\S$ 50

The presumption, except where confidential relations exist, is against fraud and in favor of fair dealings.

**5. Fraudulent conveyances**  $\S$ 298(1), 300(1)

In action to set aside fraudulent conveyance, evidence warranted judgment for defendants on ground that conveyance was made for a valuable consideration and was not made with intent to delay or defraud creditors. Civ.Code,  $\S\S$  3439, 3442.

**6. Fraudulent conveyances**  $\S$ 115(1)

A debtor may prefer one creditor to another, and while under some circumstances, transfer resulting in preference may be set aside for benefit of all creditors in bankruptcy proceeding, such transfer may not be set aside solely because a preference may have resulted. Civ.Code,  $\S\S$  3432, 3439, 3442.

named defendant filed a cross-complaint to quiet title. From an adverse judgment, plaintiff appeals.

Affirmed.

Landels, Weigel & Crocker, of San Francisco, for appellant.

Jewel Alexander and Elliott M. Epstein, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought to set aside an alleged fraudulent conveyance from Anne E. Stolz to defendant Mildred L. Epstein. Said defendant filed an answer denying practically all of the material allegations of the complaint and also filed a cross-complaint to quiet title. The trial court found in favor of said defendant and cross-complainant upon the material issues made by the pleadings and entered its judgment accordingly. Plaintiff appeals from said judgment.

Plaintiff's complaint was apparently drawn upon the theory that the conveyance was void under the provisions of both sections 3439 and 3442 of the Civil Code as said sections read prior to their repeal in 1939.

Section 3439 then read: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Section 3442 then read: "In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

[1,2] The distinction between the provisions of the two sections has been indicated in numerous cases. *Vogel v. Sheridan*, 4 Cal.App.2d 298, 40 P.2d 946; *Allee v.*

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by Lester B. Millard against Mildred L. Epstein and others to set aside an alleged fraudulent conveyance, wherein



Shay, 92 Cal.App. 749, 268 P. 962; Hanscome-James-Winship v. Ainger, 71 Cal.App. 735, 236 P. 325. As pointed out in said authorities, the question of actual intent is of controlling importance in actions brought under section 3439 while the question of actual intent is immaterial in actions brought under the proviso in section 3442. Furthermore, the proviso of section 3442 is not applicable to a conveyance made for a valuable consideration. Security Trust Co. v. Silverman, 210 Cal. 578, 579, 292 P. 636; Fares v. Morrison, 54 Cal.App.2d 773, 129 P.2d 735; Shasta Lumber Co. v. McCoy, 85 Cal.App. 468, 259 P. 965; Hopkins v. White, 20 Cal.App. 234, 128 P. 780.

Plaintiff alleged in his complaint that during the pendency of an action by plaintiff against Anne E. Stolz and others, said Anne E. Stolz conveyed to defendant Mildred L. Epstein by a deed dated March 10, 1939, her undivided one-half interest in certain real property in San Francisco; that said conveyance was made "wholly without consideration and with intent to hinder, delay and defraud creditors and particularly this plaintiff"; and that "Anne E. Stolz was, prior to and at the time of the making of said conveyance, and became, by reason of said conveyance, and still is, insolvent". The trial court found that Anne E. Stolz conveyed said property to defendant Mildred Epstein on March 11, 1939, by delivering to her a valid deed thereto; that said deed was made and delivered "for a valuable, adequate and sufficient consideration and which consideration was equivalent to the value of the interest in the real property so conveyed"; and that the conveyance was not made with intent to delay or defraud plaintiff or any creditor.

In his opening brief, plaintiff states that said findings were "against the great weight of the evidence", but it is apparent from his reply brief that his contention is that the evidence was wholly insufficient to support said findings. We find no merit in this contention.

The evidence showed that Anne E. Stolz and her sister, defendant Mildred L. Epstein, had inherited undivided one-half interests in the real property in question from their mother; that Anne E. Stolz was indebted to defendant Mildred L. Epstein at the time the conveyance under attack was made in the sum of \$6,136.60 for money previously advanced to and on behalf of said Anne E. Stolz and that said defendant gave to said Anne E. Stolz a receipt for

the payment of \$5,000 of said indebtedness at the time the conveyance was made. The trial court found that the reasonable value of interest so conveyed was \$4,400 and it is conceded that there was ample evidence to sustain said finding. The evidence further showed that Anne E. Stolz also owned securities having a value in excess of \$4,000 which she did not dispose of until some time after plaintiff had subsequently obtained judgment against her in the sum of \$3,000.

[3] Plaintiff sets forth defendant's testimony and states "This was defendant's explanation of the conveyance to her. If there had been no other evidence before the trial court, it would have been reasonable for it to accept this explanation and made findings of fact accordingly. However, there was before the trial court evidence which showed that defendant's explanation was unfounded in true fact". We find no other evidence which would warrant an appellate court in declaring that the trial court was not justified in accepting defendant's testimony. The most that can be said is that the evidence to which plaintiff refers might have warranted the trial court in making contrary findings if the trial court, after hearing such evidence and after judging the credibility of the witnesses, had determined that defendant's explanation was "unfounded in true fact". But the question of the credibility of witnesses and of the weight to be given to the testimony was a question for the trier of the facts.

[4,5] The trial court found upon ample evidence that the conveyance was made for a valuable consideration and, under the authorities above cited, the proviso of section 3442 was therefore inapplicable. The trial court further found that the conveyance was not made with intent to delay or defraud any creditor and if that finding is supported, plaintiff was not entitled to recover under section 3439. There was no direct testimony to show any intent to defraud on the part of the grantor, who was not a witness, and the evidence shows that the defendant Mildred L. Epstein knew nothing of the pendency of plaintiff's action against the grantor. The presumption, except where confidential relations exist, is against fraud and in favor of fair dealings. Hedden v. Waldeck, 9 Cal.2d 631, 72 P.2d 114; Casey v. Leggett, 125 Cal. 664, 58 P. 264; Farmers Auto, etc., Exchange

v. Calkins, 39 Cal.App.2d 390, 103 P.2d 230. If we assume without deciding, that there was evidence which might have warranted an inference that there was an intent to delay or defraud plaintiff, it cannot be said that the evidence was such as to compel a finding to that effect. We therefore conclude that the findings of the trial court find ample support in the evidence.

[6] In conclusion, we may state that the law of this state expressly permits a debtor to pay one creditor in preference to another (Civil Code, § 3432) and while under certain circumstances, a transfer resulting in a preference may be set aside for the benefit of all creditors in a bankruptcy proceeding, such transfer may not be set aside in action of this kind solely because a preference may have resulted. Hedden v. Waldeck, 9 Cal.2d 631, 72 P.2d 114; Hibernia Sav. & Loan Society v. Belcher, 4 Cal. 2d 268, 48 P.2d 681.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., pro tem., concur.



58 Cal.App.2d 872

**KELLEY et al. v. CITY AND COUNTY  
OF SAN FRANCISCO, et al.**

Civ. 12317.

District Court of Appeal, First District,  
Division 2, California.

May 28, 1943.

**1. Appeal and error ☞1067  
Automobiles ☞246(60)**

In action for wrongful death of plaintiffs' minor son who was struck by defendants' bus while riding a bicycle, where defendants presented defense that their bus driver was not negligent and that plaintiffs' son was guilty of contributory negligence, refusal to instruct on presumption that plaintiffs' son used reasonable care for his own safety constituted prejudicial error.

**2. Automobiles ☞246(60)**

In action for wrongful death of plaintiffs' minor son who was struck by defendants' bus while riding a bicycle, where one

of defenses presented was that plaintiffs' son was guilty of contributory negligence, and plaintiffs introduced evidence that it was their son's habit to stop his bicycle before entering intersection at which accident occurred and to proceed across street in the pedestrian lane, instruction that such evidence of habit was some evidence of due care which son was presumed to have exercised should have been given.

**3. Automobiles ☞246(58)**

In action for wrongful death of plaintiffs' minor son who was struck by defendants' bus while riding a bicycle, plaintiffs requested instruction on duty of care required of a minor should have been given, notwithstanding that evidence showed that plaintiffs' son who was 13 years old was intelligent and was a junior traffic officer conversant with traffic regulations.

**4. Automobiles ☞246(57)**

In action for wrongful death of plaintiffs' minor son who was struck by defendants' bus while riding a bicycle, where issue of inevitable accident was a material theory of defendants' defense to whole cause of action and there was evidence to support such theory, an instruction on inevitable accident was proper.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by George Kelley and Bessie Kelley against City and County of San Francisco and another for wrongful death of plaintiffs' minor son. From a judgment for defendants, the plaintiffs appeal.

Reversed.

Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for appellants.

John J. O'Toole, City Atty. and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs have appealed from an adverse judgment based upon the verdict of a jury in an action for damages for the wrongful death of their minor son.

The minor's fatal injuries were received when he was struck, while riding a bicycle, by a passenger bus owned and operated by the defendant City and County, and driven by the defendant Thompson, admittedly its employee acting within the scope and in the

course of his employment. The appellants' specifications of error are the failure of the court to instruct the jury: (1) that it is presumed that the decedent exercised reasonable care for his own safety; (2) that evidentiary effect should be given testimony as to the decedent's habit in stopping before entering the intersection and in traversing the intersection in the pedestrian lane; and (3) that what constitutes ordinary care on the part of a minor is to be judged by that degree of care customarily exercised by children of like age, mental capacity, and discretion; and that the court erroneously instructed the jury on "inevitable accident".

The accident occurred at about 6:40 p. m. on April 12, 1941, at the intersection of 25th Street and Van Ness Avenue South, in the City and County of San Francisco. Van Ness Avenue South runs in a general northerly and southerly direction. There are two sets of street car tracks thereon; that is, four rails in all. It is an arterial boulevard and there are "stop" signs at the northeast and southwest corners at its intersection with 25th Street. 25th Street runs in a general easterly and westerly direction. Shortly before the accident, which occurred during the daylight hours and at a time when the pavements were dry, defendant Thompson was driving the bus north on Van Ness Avenue South. He was going to the municipal garage and was carrying no passengers. The bus was straddling the most easterly of the street car rails and proceeding at about 15 miles per hour. The decedent was a thirteen year old boy, about 5 feet 7 inches in height and weighing about 160 pounds. He was a student in junior high school and had been a junior traffic officer for three or four years. As such he was familiar with traffic regulations. He was normal, healthy, and intelligent. At the time of the accident he was riding his bicycle west on 25th Street. The impact occurred in the northwest quadrant of the intersection. The bicycle was struck by the front of the bus slightly to the right of its center which then seems to have been at about the most easterly street car rail. The distance from the south to the north curb line of 25th Street is 48 feet. The distance from the stop sign at the northeast corner to the point of impact is about 33 feet.

The only witness to the accident was the defendant Thompson. (The stipulated testimony of the attendant at a gasoline

station on the southeast corner would create a conflict on one point, hereinafter noted, but this conflict admittedly must be deemed to have been resolved in favor of the defendants by the jury.) Thompson testified that as he first approached 25th Street he looked to his left, or west, and observed nothing. He then looked to his right and saw an automobile standing on 25th Street about opposite the stop sign at the northeast corner. This automobile started up but stopped about 5 feet into the intersection, or as he expressed it "about half the length of the automobile", and motioned the bus to go on. Thompson first saw the boy at about the north line of the intersection about two and a half feet away and already in front of the bus. From the path of the bicycle he estimated that it came from between the right side of the automobile and the north curb of 25th Street. Upon seeing the boy Thompson turned to his left and then fully applied his brakes. The conflict referred to above was that it was stipulated that if the station attendant were called as a witness he would testify that immediately after the accident he looked across 25th Street and saw no automobiles at or near the intersection.

As a predicate to their contention that the failure to give the instructions referred to constituted prejudicial error appellants contend that this evidence clearly showed that the respondents were guilty of negligence. Respondents contend to the contrary that this evidence is such that the jury's verdict must be construed to be an implied finding that they were not guilty of negligence and therefore any failure to give instructions with respect to contributory negligence would not have resulted in a miscarriage of justice. Here it should be said, in reference to the issue of respondents' negligence, that the record discloses, on the part of the respondent Thompson, an unusual effort during his testimony to give an honest, fair, and full recital of the circumstances of the accident. The jury may well have concluded from this testimony that the respondents were not negligent, and that the accident was unavoidable.

In answer to the defense of contributory negligence the appellants offered the following instructions, and others of like purport, all of which were refused:

"At the outset of this trial each party was entitled to the presumption of law that



every person takes ordinary care of his own concerns and that he observes the law. These presumptions are a form of prima facie evidence and will support findings in accord therewith in the absence of evidence to the contrary. \* \* \*

"Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs."

"The law presumes that the deceased child took ordinary care of his own concerns. When the facts and circumstances of his death are in evidence, they are aided by this statutory presumption as a specie of evidence in behalf of the plaintiffs in this case. In other words, this presumption that the deceased child took ordinary care of his own concerns is evidence in this case and is to be weighed by you together with all of the other evidence in the case, and you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a presumption or other evidence satisfying your minds."

[1] Appellants argue that insofar as the verdict may have been based entirely upon an implied finding of contributory negligence, the existence of the presumption and its weight as evidence was vital to their case. Respondents do not contend that the instructions were otherwise given in substance or effect nor do they seriously contend that it was not error to refuse them, but they argue that no miscarriage of justice has resulted. The question of prejudice in a case of this kind is difficult. If the issue of contributory negligence had not been raised we have no doubt that the finding that respondents were not negligent would have been fully supported by the evidence. But it is impossible to say upon what issue the verdict rests. The issue of contributory negligence was a vital one which the appellants were privileged to defend. The refusal to give these instructions cuts off the only defense possible, because of the death of the boy and the absence of witnesses, and must therefore be deemed prejudicial. It is settled law that each party is entitled to have his theory of the case go to the jury, and requested instructions, which are proper in form and substance, should not be refused, merely because the trial court does not accept the theory upon which a party relies. 24 Cal. Jur. p. 826.

[2] Appellants introduced evidence, through the mother of the decedent, that it was the boy's habit to stop his bicycle before entering Van Ness Avenue South and to proceed across that street in the pedestrian lane. They urge that the trial court committed reversible error in refusing the following instruction:

"If you find that it was the habit of deceased in crossing from the easterly to the westerly side of Van Ness Avenue South on his bicycle to use the pedestrian lane at the northerly side of the intersection of that street with 25th Street and that it was also his habit to stop at the stop sign on the easterly side of this intersection before attempting to cross Van Ness Avenue South, you may consider these facts in determining whether or not the deceased was guilty of contributory negligence as I have defined it."

The respondents reply that there was no error, first because the boy while riding a bicycle should have used the roadway and not the pedestrian lane, and second that there was no testimony as to what the boy did when his mother was not present. This evidence of habit is some evidence of the "due care" which the deceased is presumed to have exercised. It is weak because it does not show that the deceased "habitually" waited at the stop sign for traffic on the boulevard to clear. However, we believe that the instruction, or one of like substance, should have been given.

[3] Appellants next contend that the court erred in failing to give the instruction offered on the duty of care required of a minor. Respondents do not contend that the form of the instruction was not proper. It is their position that the evidence that the decedent was intelligent and was a junior traffic officer conversant with traffic regulations was sufficient as a matter of law to hold him to the same standard of conduct as an adult. But appellants were entitled to have their theory go to the jury, and this proposed instruction, or one covering the subject matter of minority, should have been given under the authorities cited in 24 Cal. Jur. p. 826.

[4] Appellants finally contend that the court erred in instructing the jury on inevitable accident as there was no evidence to support any such theory. Respondents reiterate their argument that the jury found them to be free from negligence so that the instruction could not have preju-

dicted the appellants. We are more inclined to the view just expressed in reference to the proposed instructions on contributory negligence. The issue of "inevitable accident" was a material theory of respondents' defense to the whole cause of action. They had the unquestionable right to have that theory go to the jury in the instruction complained of.

The judgment is reversed.

SPENCE, J., and DOOLING, J., pro tem., concur.



59 Cal.App.2d 8

**RAMACCIOTTI et al. v. GALIANO et al.**  
Civ. 12133.

District Court of Appeal, First District,  
Division 1, California.

May 29, 1943.

#### 1. Appeal and error ⇨770(1)

Where respondents filed no brief, and offered no explanation for failure to appear at time of argument, appellate court in its discretion would invoke court rule providing that upon respondent's failure to file points and authorities within time allowed cause may be submitted upon appellant's brief. Rules of the Supreme Court and District Courts of Appeal, rule 5.

#### 2. Replevin ⇨8(4)

To sustain action for recovery of specific personalty, plaintiff must have right to immediate and exclusive possession of such property at time of commencement of action.

#### 3. Replevin ⇨10

An action to recover possession of personalty will not lie unless at time action is commenced defendant has possession of property or power to deliver it in satisfaction of judgment for its possession, and a person himself in possession cannot while such possession continues bring such an action.

#### 4. Chattel mortgages ⇨172(1)

Where chattel mortgagee claiming the right under the mortgage and acting

through agent forbade mortgagors from removing mortgaged property from ranch, mortgagors who continued in possession of such property could not maintain an action for claim and delivery.

#### 5. Chattel mortgages ⇨172(5)

Evidence showing that mortgagors' tractor was used by mortgagee's watchman several weeks after commencement of mortgagors' claim and delivery action and failing to show that mortgagee was connected with use of tractor did not warrant a judgment against mortgagee for use of the tractor.

#### 6. Chattel mortgages ⇨172(5)

A judgment awarding \$150 for use of tractor was unwarranted under evidence of former partner of owners of tractor that he had seen tractor used on one day only and that he would not consider \$150 a day a proper charge for the use.

#### 7. Appeal and error ⇨773(1)

Where respondents filed no brief and did not answer appellants' contentions, appellate court would assume that respondents considered appellants' contentions meritorious and that respondents had "abandoned" any attempt to support the judgment. Rules of the Supreme Court and District Court of Appeal, rule 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

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Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Dante Ramacciotti and others, doing business under the firm name and style of D. Ramacciotti & Co., against Joe Galiano, Thomas McCambridge and others to recover possession of personal property or the value thereof. From a judgment for plaintiffs, named defendants appeal.

Reversed.

Murphy & Hall, of Santa Cruz, for appellants.

Joseph J. Bullock, of Redwood City, for respondents.

KNIGHT, Justice.

Plaintiffs, as copartners, brought this action to recover the possession of certain personal property, or, in the event delivery could not be had, for the sum of \$2,187.50, the alleged value thereof; also for the sum

of \$150 as damages for the alleged wrongful use of a tractor. A joint answer was filed by the defendants Galiano and Fornasier denying the allegations of the complaint, and the defendant McCambridge answered separately, also denying the allegations of the complaint. It was alleged in the complaint that the property involved was located on a ranch near Pescadero. It consisted of four horses, a Ford truck, farming equipment, household furniture and kitchen utensils, a frigidaire, pipe, tanks, tools, wine cooperage, 2 tons of straw and 50 rabbits. The cause was tried without a jury, and the findings and judgment were in favor of plaintiffs and against the defendants Galiano and McCambridge. The terms of the judgment call for the delivery of the property or the payment of the sum of \$2,187.50 in case delivery cannot be had; also for the payment of the additional "sum of \$150 for the unlawful use of a certain Caterpillar Tractor belonging to plaintiffs." It does not appear from the findings or judgment how the action was disposed of as to the defendant Fornasier. The defendants Galiano and McCambridge appeal, and among the grounds urged for reversal is insufficiency of the evidence.

The respondents failed to file any brief. The transcript was filed March 14, 1942; the due date for filing respondents' brief was July 9, 1942; and after notice to the respective parties the appeal was placed on the calendar for argument on February 23, 1942. On September 25, 1942, and again on December 17, 1942, the clerk of this court notified counsel for respondents that the time for filing respondents' brief was long overdue, and requested that it be filed. In response to the first letter counsel for respondents wrote that the case was about to be settled and that a settlement would be reached within ten days. There was no answer to the clerk's second letter; nor did respondents appear in person or by attorney at the time of oral argument, or offer any explanation for failure to appear. The appeal was thereupon ordered submitted on the appellants' brief.

[1] Rule V of the Supreme Court and District Courts of Appeal provides that if the respondent does not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the appellant's brief, in which case the court may, in its discretion, decide the case upon the statement of facts contained in such appellant's brief. It is our

opinion that under the circumstances the court is warranted in invoking the operation of said rule. Therefore, accepting as true the statement of facts in appellants' brief, the facts of the case may be stated as follows: Prior to May 1, 1941, respondents were engaged in farming property known as the Flora E. Steele Ranch near Pescadero. They had received certain money advances from McCambridge, and had mortgaged to him certain personal property located on the ranch. The mortgage contained the usual provision against removing the property without the consent of the mortgagee. On May 1, 1941, one of the respondents, Dante Ramacciotti, accompanied by one Del Cielo, a drayman, attempted to remove certain personal property from the ranch in violation of the express terms of the mortgage prohibiting such removal, and were prevented from doing so by Galiano, a watchman employed by McCambridge. No demand was ever made upon either Galiano or McCambridge for the delivery of any specific property, nor was any claim made that any of the personal property claimed by respondents was ever sold, disposed of, concealed, or destroyed by either of the appellants, or that they removed any part thereof from the Steele ranch, or that respondents' possession of the property on the Steele ranch was in any manner disturbed. They relied solely on the claim that they were refused permission to remove the property described in their complaint from the Steele Ranch. Moreover, it was conceded that respondent Dante Ramacciotti, the manager of the partnership, continued to reside on the ranch for a long time after the action was commenced and occupied the house in which a considerable portion of the personal property was located, and that it was while Ramacciotti was still living on the ranch that respondents instituted the present action for the recovery of the possession of the property.

[2, 3] It is well settled that to sustain an action for the recovery of specific personal property the plaintiff must have the right to immediate and exclusive possession of such property at the time of the commencement of the action (5 Cal. Jur. p. 161; *Fredericks v. Tracy*, 98 Cal. 658, 33 P. 750); furthermore that an action to recover possession of personal property will not lie unless at the time the action is commenced defendant has the possession of the property or the power to deliver it in satisfaction of a judgment for its possession; and by virtue of



this rule a person who himself is in possession cannot while such possession continues bring an action of this kind. 5 Cal. Jur., pp. 164, 165; *Carman v. Ross*, 64 Cal. 249, 29 P. 510.

[4] In the present case it appears that none of the property in suit was in the possession of either of the appellants at the time of the commencement of the action; it remained at all times in the possession of the respondents on the Steele ranch, which belonged to the Steeles; therefore, under the legal principles above set forth, there could be no factual basis for an action in claim and delivery against either of these appellants. The most that can be said in support of the judgment is that McCambridge, claiming the right to do so under the terms of the chattel mortgage and acting through Galiano, forbade respondents from removing from the ranch certain items of personal property covered by said mortgage. But as stated, respondents at all times prior to and at the time of the commencement of the action continued in the possession of the property, and in that situation an action for claim and delivery is not maintainable. Whether under the circumstances respondents would have been entitled to invoke a remedy for the alleged unlawful interference with their attempt to remove the property from the ranch is not a question with which we are here concerned.

[5,6] The evidence as set forth in appellants' statement of facts is also insufficient, in our opinion, to sustain the trial court's finding upon which it based that portion of the judgment awarding respondents \$150 for the use of a tractor. In this regard it appears that a tractor was used by Galiano on the ranch during the month of June, 1941, which was several weeks after the commencement of the action and after respondents' lease had expired, and they had left the ranch, at which time the possession thereof evidently reverted to the lessors; and there is no evidence showing that McCambridge was in any way connected with the use of the tractor. Furthermore and in any event, the only testimony that the reasonable value of the use of the tractor was \$150 was given by the witness Poletti, a former partner; and in the final analysis the substance of his testimony on that point was merely that he had seen the tractor used on one day only and that he would not consider \$150 a day a proper charge for the use of a tractor.

\* Subsequent opinion 143 P.2d 689.

[7] Several additional grounds are urged by appellants in support of their appeal, but in view of the fact that respondents have made no effort by way of filing a brief or presenting any oral argument to answer any of the contentions made by appellants, we are entitled to assume that they consider appellants' contentions meritorious (*Bendlage v. Kohlsaat*, 54 Cal.App.2d 136, 128 P.2d 691) and that they have abandoned any attempt to support the judgment. *Zeigler v. Bonnell*, 52 Cal.App.2d 217, 126 P.2d 118; *Duisenberg-Wichman & Co. v. Johanson*, 123 Cal.App. 125, 10 P.2d 1010; *Doud v. Jackson*, 102 Cal.App. 213, 283 P. 107. It is unnecessary, therefore, to give attention to the additional grounds so urged.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.



In re BRISTOL'S ESTATE.\*

BRISTOL v. YOUNG.

Civ. 14067.

District Court of Appeal, Second District,  
Division 1, California.

May 20, 1943.

Hearing Granted July 15, 1943.

#### 1. Wills ⇨289

Under probate section providing that no will shall be proven as a lost will unless proven to have been in existence at testator's death, etc., proponent of lost codicil had burden of proving that the codicil was in existence at testator's death. Probate Code, § 350.

#### 2. Constitutional law ⇨70(1)

Evidence ⇨53

The word "law", referred to in section of the Code of Civil Procedure defining a presumption as a deduction which the law expressly directs to be made from particular facts, refers to the law as declared by statute in light of section of Code of Civil Procedure that the Code established the law, and therefore the courts are without power expressly to direct what deductions are to be made from

particular facts. Code Civ.Proc. §§ 4, 1959.

See Words and Phrases, Permanent Edition, for all other definitions of "Law".

### 3. Evidence ⇨53, 595

A distinction is recognized between an "inference" and a "presumption".

See Words and Phrases, Permanent Edition, for all other definitions of "Inference" and "Presumption".

### 4. Wills ⇨439

Court must determine and carry out testator's intention and any concern for the feelings of some third party is irrelevant.

### 5. Trial ⇨194(9)

Instruction submitting the presumption from nondiscovery of a will once existing to testator's revocatory destruction of it is a prohibited "comment on the evidence" and is not a fair and general comment which a trial judge is authorized to make on the evidence. Const. art. 6, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Comment on the Evidence".

### 6. Evidence ⇨87, 595

Disputable inferences or presumptions are "evidence" the weakest and least satisfactory.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

### 7. Evidence ⇨53, 87, 99

The rules of evidence are guides for reasoning processes that experience has found to be reliable, and presumptions, as evidence, enjoy no special distinction and their value is relative. Code Civ.Proc. §§ 1823, 1957.

### 8. Appeal and error ⇨989, 1011(1)

When a conflict arises between a disputable presumption and other evidence, the court or jury is presented with the "means of ascertaining the truth", and the determination thereof in such circumstances is final, and the only possible question on appeal is whether there is evidence of a substantial character to sustain the finding or conclusion. Code Civ.Proc. §§ 1823, 1957.

### 9. Wills ⇨322, 386

In proceeding to probate a lost codicil, the rules of evidence are the same as in

any other action, and the trial judge is the exclusive judge of the weight of the evidence and the credibility of witnesses.

### 10. Wills ⇨386

On appeal from judgment admitting lost codicil to probate, question was not whether there was any substantial evidence to overcome presumption that a will last known to be in decedent's possession which cannot be found is presumed to have been destroyed by him with the intention of revoking it, but was whether there was any evidence of a substantial character to support finding that codicil was in existence at testator's death. Probate Code, § 350.

### 11. Wills ⇨302(8)

Where due execution of unsigned copy of codicil was established by the testimony of the attorney who drew the codicil and by the secretary who typed and witnessed it, evidence sustained finding that lost codicil was in existence at testator's death, authorizing admission of copy of codicil to probate. Probate Code, § 350.

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Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Proceeding in the matter of the estate of Luther Bristol, deceased, by Agnes Bristol against Edith Young. From a judgment admitting a will and two codicils to probate, Agnes Bristol appeals.

Affirmed.

Jacob Forst and W. P. Smith, both of Los Angeles, for appellant.

Don Lake and Charles G. Young, both of Los Angeles, for respondent.

DORAN, Justice.

This appeal involves the question as to whether there is sufficient evidence to support the findings of fact in a probate proceeding wherein the trial court admitted a will to probate, including as a part thereof an alleged lost codicil. There is no dispute about the will being entitled to probate, nor about a so called first codicil dated July 28, 1939. The will named Agnes Bristol, the widow of deceased, as the executrix. Another codicil denominated by the testator as codicil number two and dated April 1, 1938, was received in evidence but denied probate, its lack of due execution being conceded. There is no dispute over the denial by the court of the probate of this codicil.

The controversy results from the admission to probate by the trial court of another codicil dated April 28, 1941, referred to herein as the "lost codicil". Said lost codicil made certain changes in the original will, among which was the elimination of appellant's name as devisee and as executrix and the substitution in lieu thereof of the name of a daughter, Edith Young, as executrix. The record reveals that the original of this so called lost codicil was not found; but respondent Edith Young produced an unsigned copy thereof and its due execution was established by the testimony of Don Lake, Esq., the attorney who drew the codicil, and by the testimony of Irene Harroun, the secretary who typed it. Other evidence was introduced for the purpose of proving by inference the existence of said codicil at the time of decedent's death and that the same had never been destroyed.

Appellant objected to the probate of the lost codicil on the grounds; "(1) That said alleged codicil of April 28, 1941, was destroyed by testator. (2) That said alleged codicil of April 28, 1941, was not in existence at the time of decedent's death. (3) That the objector, Agnes Bristol, is the widow of the said deceased and is entitled to the priority of the appointment under the law."

The court, among other things, found as follows:

"4. That the deceased left a will dated the 1st day of April, 1938, and a codicil to said will dated the 28th day of July, 1939; that the deceased made and executed a codicil (to his will of April 1, 1938, and the codicil of July 28, 1939) on the 28th day of April, 1941, which said codicil has not been found.

"5. The court finds that the deceased never cancelled or destroyed the codicil of April 28, 1941, and said codicil was in existence at the time of his death; that no other wills or codicils were executed by the deceased subsequent to the 1st day of April, 1938; that the will dated April 1, 1938, and the codicil dated July 28, 1939, and the codicil dated April 28, 1941, are the last will and testament of the deceased."

Accordingly, the will and said two codicils were admitted to probate and letters testamentary issued to Edith B. Young.

It is contended by appellant that the so called lost codicil having been last seen in the possession of the decedent and not having been found, there was no substantial

evidence to overcome the presumption that it was not in existence at date of decedent's death and that it was destroyed by the testator with the intention of revoking it; hence the action of the court in admitting the same to probate and the appointment of Edith B. Young as executrix was error.

The evidence reveals that Mr. Don Lake, the attorney who prepared the codicil, testified at length as to the circumstances surrounding its preparation and execution, including the declarations by decedent to him as to the reasons for the codicil in question. Irene Harroun, a stenographer in Mr. Lake's office identified the carbon copy of the codicil and testified that she had typed it and signed the original as a witness in Mr. Bristol's presence. Both Mr. Lake and Miss Harroun testified that after the codicil had been duly executed Mr. Bristol, the deceased, put it in his pocket and left. Della Bristol testified on behalf of respondent, among other things, that she arrived in Los Angeles from the north about the 22nd of September; that decedent died on September 30th; that on the day she arrived she had a conversation with appellant Agnes Bristol, at which time Agnes Bristol said that if she could ever get her fingers on the will and the deeds she would tear them all up except Walter's, (referring to testator's son). The foregoing recital is brief but serves as an outline of the evidence.

Section 350 of the Probate Code provides: "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge \* \* \*."

Appellant relies on a doctrine first enunciated in California in 1921 in *Re Estate of Sweetman*, 185 Cal. 27, 195 P. 918. There the court held as follows: "A will last seen and known to have been in the possession of the decedent, which cannot be found after his death, will be presumed to have been destroyed by him with the intention of revoking it, since the law always presumes in favor of the innocence of an act, and any other inference would involve a finding of a wrongful or fraudulent destruction of the will by a third person." Later cases followed the *Sweetman* case, for example, *In re Estate of Johnston*, 188 Cal. 336, 339, 340, 206 P. 628; *In re Estate of Smith*, 140 Cal.App. 508, at page 516, 35



P.2d 335. Accordingly, appellant argues that the real question presented by this appeal is whether there is any substantial evidence in the record sufficient to overcome the above stated presumption of law; that if there is substantial evidence the judgment should be affirmed; if there is not, the judgment should be reversed.

Respondent raises no issue as to the validity and virtue of the above presumption but contends in substance and effect that the court's decision upholding the codicil is supported by sufficient evidence to overcome the presumption.

Incidental to the issue involved, the controversy herein presents an interesting and important question, namely, whether the presumption established as a doctrine in *Re Estate of Sweetman*, supra, can be promulgated and established by judicial decision in the light of statutory provisions on the same subject. It is at once evident that if the presumption in the *Sweetman* case is invalid, then the decisions that follow and are based thereon, are also invalid. Said presumption relies for its authority on 14 *Encyclopedia of Evidence* 440, and the cases therein cited to support the text. It is noteworthy that no California cases are cited.

[1] Section 350 of the Probate Code, supra, imposed upon respondent the burden of proving that the codicil in question was in existence at the time of the death of the testator. No statute imposes the additional burden created by judicial decision in *Re Estate of Sweetman*, supra, hence the question as to the authority of the courts in effect to legislate on this important requirement in such circumstances is pertinent. What the rule may be in other states is of little assistance in California. The question appears to be settled by the code provisions on the subject, hence the power of the courts to add or detract therefrom is open to serious question.

[2] Section 4 of the Code of Civil Procedure provides as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. *The code establishes the law of this state respecting the subjects to which it relates*, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." (Italics added) With relation to the subject of presumptions the Code of Civil

Procedure *establishes the law* as follows, in part, by Section 1959 thereof. "A presumption is a deduction which the *law* expressly directs to be made from particular facts." (Italics added) In the same chapter is to be found the conclusive presumptions and the presumptions that may be controverted. See the dissenting opinion of Mr. Justice Traynor in *Speck v. Sarver*, 20 Cal.2d 585, at page 590, 128 P.2d 16. Manifestly the "*law*" referred to in section 1959 of the Code of Civil Procedure refers to the law as declared by statute. Read in the light of section 4 of the Code of Civil Procedure it can mean nothing else. Therefore it would appear that the courts are without power to "expressly" direct what deductions are to be made from particular facts because the code has established the law in that regard.

[3] As to the presumption in question, Wigmore observes: "There are various other situations in which a retrospectant inference is permissible from the absence of certain results to the absence of certain causes. Most of these raise no doubt of admissibility and are commonly of importance only in the rules of presumption or elsewhere; the chief of these are the *INFERENCE* from the *non-discovery of a will* once existing, to the testator's *revocatory destruction* of it \* \* \*." 1 Wigmore on Evidence 218, sec. 160 (Emphasis on "inference" supplied) And again: "The *revocation* of a will by destruction may be *INFERRED*, on a principle of Relevancy already considered (ante sec. 160), from the fact that it once existed but cannot be found at the testator's death. Whether this circumstance, with or without others, should create a rule of presumption, or of sufficiency of evidence, has been much *DEBATED*." 4 Wigmore on Evidence 3569, sec. 2523. (Emphasis supplied, italics included.) Thus it will be seen that a distinction is recognized, and properly so, between an inference and a presumption. And the rule is not accepted by Mr. Wigmore as a presumption.

[4] The only reason given for the rule is that any other inference would involve a wrong to a third person. Just why a third person should be injected into the situation is not clear. If such third person is innocent of any wrong no protection is needed, and, on the other hand, if such third person is in fact guilty of a wrong, then no protection by means of a presumption should be available. Moreover, there

is no more reason to suppose that a third party destroyed a will than there is to suppose that a will was actually lost. In any event, it is the court's duty to determine and carry out the intention of the testator and any concern for the feelings of some third party obviously is irrelevant to the fulfillment of this duty. To allow such anxiety for the feelings of a third party to interfere with the proof of the testator's intention is unwarranted.

The Constitution provides, with regard to jury trials: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." Cal.Const. Art. VI, sec. 19.

[5] The presumption in question does more than merely comment on the evidence. It is a specific direction that certain conclusions must be applied to certain facts. In no sense is it a "fair and general comment which a trial judge is now authorized to make". *People v. Eudy*, 12 Cal.2d 41, 82 P.2d 359, 361. That such a rule of presumption effectively prevents a freedom of decision on questions of fact by either judge or jury is inevitable.

The declaration of Mr. Wigmore to the effect that the revocation of a will by destruction may be inferred, but whether such circumstance should create a rule of presumption has been much debated; the question raised by statutory law and the constitution as well, as to the power of the courts to establish the presumption in question by judicial decision; and the inherent mischievous character of the rule itself as a presumption, together expose its inherent defects and invalidity.

[6] "Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory." So declared the Supreme Court in *Savings and Loan Society v. Burnett*, 106 Cal. 514, 529, 39 P. 922, 925; and this appraisal has been quoted repeatedly in subsequent decisions. In *re Estate of Coolman*, 112 Cal.App. 744, 297 P. 593; *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 7, 210 P. 269, 272. The latter case points out that "there seems to be some confusion in the decisions of

this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts". The opinion assembles three groups of decisions in support of the premise that confusion exists and then proceeds to "resolve this apparent conflict" by adding a fourth rule. Whether success has attended the effort is doubtful.

[7,8] There is no mystery about the presumptions and there should be no difficulty in avoiding confusion. Evidence is the *means* of ascertaining the truth. Code Civ.Proc. sec. 1823. A presumption is declared by law to be evidence, Code Civ. Proc. § 1957, and as such is one of the means of ascertaining the truth. The rules of evidence, which are not complicated, are the product of many years of experience and in a sense are guides for reasoning processes that such experience has found to be safe and reliable. The presumptions, as evidence, enjoy no special distinction and their value manifestly is relative. When a conflict arises between a disputable presumption and other evidence the court or jury, as the case may be, is presented with the "means of ascertaining the truth", and the determination thereof in such circumstances is final. The only possible question on appeal is whether there is evidence of a substantial character sufficient to sustain the finding or conclusion.

As pointed out by Mr. Justice Traynor in *Speck v. Sarver*, supra, 20 Cal.2d at page 598, 128 P.2d at page 23: "It is time to have done with the confusion and inconsistency engendered by its (the court's) vacillation between the acceptance and the repudiation of presumptions as evidence."

[9] In connection with consideration of the evidence and the trial court's findings, it should be emphasized that the rules of evidence are the same in the trial of the within action as any other. The trial judge is the exclusive judge of the weight of the evidence and the credibility of the witnesses. What may appear to be slight evidence to an interested party may appear substantial to the trial judge and in the end, convincing.

[10,11] As heretofore noted, the record reveals the sole issue presented for determination to the trial court was whether the codicil in question was in existence at the time of the testator's death. The question on appeal is not, as contended for by appellant, whether there is any substantial

evidence to overcome the presumption hereinbefore considered, but whether there is any evidence of a substantial character to support the findings of the trial court. Without going into further detail as to the evidence adduced at the trial on this issue it is sufficient to note that the record reveals it to be abundantly adequate to meet all requirements on appeal in this regard.

There are no errors in the record and for the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



58 Cal.App.2d 729

**PEOPLES FINANCE & THRIFT CO. OF  
VISALIA v. BOWMAN et al.**

Civ. 3067.

District Court of Appeal, Fourth District,  
California.

May 24, 1943.

Rehearing Denied June 22, 1943.

**1. Sales ⇨473(1)**

A buyer of automobile from dealer was a "buyer in ordinary course of trade" and obtained good title to automobile free from lien of trust receipts. Civ.Code, § 3012 et seq., and § 3013, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Buyer in Ordinary Course of Trade".

**2. Sales ⇨473(1)**

Finance companies, which advanced moneys to automobile dealer who issued trust receipts on automobiles, were "intrusters" who gave "new value" and were "purchasers" as those persons are defined in Uniform Trust, Receipts Law. Civ.Code, § 3013.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrusters", "New Value" and "Purchasers".

**3. Sales ⇨467**

Where trust receipt issued by automobile dealer permitted sale for cash or upon terms approved by intruster and provided that all proceeds and "considerations"

should be delivered to intruster as "security" for payment, the quoted words indicated the receipt of something besides money by dealer since money would easily come within definition of "proceeds". Civ. Code, § 3012 et seq., § 3013, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration", "Proceeds" and "Security".

**4. Statutes ⇨188**

Statute must ordinarily be construed according to general and accepted definitions of the words used.

**5. Statutes ⇨174, 181(1), 188**

An exception to the general rule that statutes must ordinarily be construed according to general and accepted definitions of the words used is that statutes must be construed to carry out intent of Legislature and to make statutes workable where possible.

**6. Account ⇨1**

"Account" ordinarily means a detailed statement of the mutual demands in the nature of debt and credit between parties arising out of contracts or some fiduciary relation.

See Words and Phrases, Permanent Edition, for all other definitions of "Account".

**7. Account ⇨1**

"Accounting" is usually striking a balance between debits and credits showing a balance due, if any.

See Words and Phrases, Permanent Edition, for all other definitions of "Accounting".

**8. Account ⇨11**

At the early common law there was an action called "account" or "account render", which action was adopted in some states and was used to compel one occupying a confidential relation to render to the other that which was his due.

See Words and Phrases, Permanent Edition, for all other definitions of "Account Render".

**9. Account ⇨1**

The word "account" is occasionally given the meaning of rendering over or paying or delivering to a creditor that which is due from a debtor, and the term "accounting" is sometimes used to mean the payment of the amount due.



**10. Sales** Ⓒ467

Under Uniform Trust Receipts Law, if trustee is given liberty of sale and is required by trust receipt to render over to entruster any money, goods, or other thing of value received as consideration in the sale of the intrusted goods, the lien of the entruster passes to such goods as may be identified if the entruster within ten days demands delivery of such goods. Civ.Code, § 3016.6.

**11. Sales** Ⓒ467

Lien of entruster on new automobile which was sold by dealer who took used automobile in part payment passed to such used automobile, where entruster took possession of such used automobile though demand for delivery was not made. Civ. Code, § 3016.6.

**12. Estoppel** Ⓒ72

The maxim that, where two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer, is applicable to cases involving trust receipts. Civ.Code, § 3016.6, 3543.

**13. Estoppel** Ⓒ72

Where automobile dealer issued trust receipt on new automobile to one finance company and sold such automobile and accepted used automobile in part payment and issued trust receipt on used automobile to another finance company without paying first company, and each company acted in good faith, loss was required to fall on first finance company. Civ.Code, § 3016.6.

**14. Sales** Ⓒ473(1)

Mere knowledge of general practice of flooring automobiles by dealer is not sufficient to place on inquiry one about to part with value for automobile.

**15. Estoppel** Ⓒ75

Where automobile dealer issued trust receipt on new automobile to one finance company and sold such automobile and accepted used automobile in part payment and issued trust receipt on used automobile to another finance company without paying first company, fact that used automobile was being traded in on a new automobile was not sufficient to put second finance company on inquiry without proof of something to indicate that dealer could not properly apply money he received from first finance company. Civ.Code, § 3016.6.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by the Peoples Finance & Thrift Company of Visalia against R. J. Bowman and Mercantile Acceptance Corporation of California for a declaratory judgment as to plaintiff's rights in automobile, wherein the corporate defendant filed a cross-complaint against plaintiff. From a judgment for plaintiff, the corporate defendant and cross-complainant appeals.

Affirmed.

Laurence B. Myers, of Fresno, and Robert G. Partridge and Wallace O'Connell, both of San Francisco, for appellant.

Bradley & Bradley, of Visalia, for respondent.

**MARKS, Judge.**

This is an appeal from a judgment in an action for declaratory relief. Plaintiff was awarded \$450, with interest and costs, to be paid out of money deposited with the county clerk of Tulare County. This money was the proceeds from a sale of a Plymouth coupe sold under stipulation.

We will refer to the Mercantile Acceptance Corporation of California as the defendant.

R. J. Bowman was an automobile dealer with his place of business in Visalia, California. Plaintiff and defendant were corporations authorized to finance the purchase and sale of new and used automobiles by means of trust receipts.

Less than a year prior to the time of the transactions here involved, Bowman and each of the corporations filed with the Secretary of State written statements of intention to engage in trust receipt financing of automobiles.

Under date of December 14, 1940, Bowman gave defendant a trust receipt on a new 1941 Pontiac coupe and received \$939.-68. Bowman placed this coupe in his stock in Visalia where it remained until January 2, 1941, when it was sold to Victor L. Kimzey. Kimzey gave in full payment of the purchase price, a used Plymouth coupe, and the balance in cash. The certificate of registration (pink slip) of the Plymouth was endorsed in blank by Kimzey and, with the car, was delivered to Bowman. Bowman did not pay anything on his debt to defendant.

On the same day Bowman took the Plymouth to the office of plaintiff and secured an

advance of \$450 and executed a trust receipt therefor, with the Plymouth as security. He delivered to plaintiff the pink slip endorsed in blank by Kimzey and returned the Plymouth to his stock where it remained until January 10, 1941.

Defendant learned of the transaction and on that date took possession of all automobiles in Bowman's place of business, including the Plymouth, and plaintiff brought this action to have determined its rights in that automobile with the result already indicated.

The trust receipt executed by Bowman to defendant contained the following: "The Trustee may, however, sell said motor vehicle for cash or on terms approved in advance in writing by Entruster, for not less than the amount due Entruster hereunder including insurance premiums and all other charges; provided, however, that upon such sale all moneys hereby secured shall become immediately due and payable, and all of the proceeds and considerations received in such sales shall be forthwith delivered to Entruster as security for payment of said moneys, and until so delivered shall be held by the Trustee separate from the funds of the Trustee and as security for such payment."

It is evident that had the two trust receipt transactions been entirely independent of each other, each would have been regular and each finance company would have secured valid security for its loan to Bowman on the respective automobile described in its trust receipt under The Uniform Trust Receipts Law. Sec. 3012 et seq., Civil Code.

[1] Kimzey was a buyer in the ordinary course of the trade and obtained a good title to the Pontiac free from the lien of defendant. Sec. 3013, subdv. 1, Civil Code; Commercial Discount Co. v. Mehne, 42 Cal. App.2d 220, 108 P.2d 735.

[2] Both finance companies were "entrusters" who gave "new value" and were "purchasers" as those terms are defined in section 3013 of the Civil Code. In the trust receipt on the Pontiac defendant had given Bowman liberty of sale.

[3] While the contract specifically permitted Bowman to sell for cash or upon terms approved in writing by defendant, it also seems to have contemplated a transaction in which Bowman might accept a used car in part payment for the Pontiac in lieu of all cash, for otherwise the provision that "all the proceeds and considerations re-

ceived in such sales shall be forthwith delivered to the entruster as security for the payment of said moneys" would be meaningless. The use of the words "considerations" and "security" would indicate the receipt of something besides money by the dealer as money easily would come within the definition of "proceeds".

Defendant confidently relies on the following provision of section 3016.6 of the Civil Code as sustaining its right to judgment here:

"Where, under the terms of the trust receipt transaction, the trustee has no liberty of sale or other disposition, or, having liberty of sale or other disposition, is to account to the entruster for the proceeds of any disposition of the goods, documents or instruments, the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows.  
\* \* \*

"(c) To any other proceeds of the goods, documents or instruments which are identifiable, unless the provision for accounting has been waived by the entruster by words or conduct; and knowledge by the entruster of the existence of proceeds, without demand for accounting made within ten days from such knowledge, shall be deemed a waiver."

The rights of defendant here must turn on the definition of the words "account" and "accounting" as used in the foregoing section.

[4, 5] It is a general rule of construction of statutes that ordinarily they are to be construed according to the general and accepted definitions of the words used. However, there are many exceptions to this rule, one of which is that they must be construed so as to carry out the intent of the legislature and to make the statutes workable where possible. Southern Pacific Co. v. Riverside County, 35 Cal.App.2d 380, 95 P.2d 688; Burger v. Hirni, 50 Cal.App.2d 709, 123 P.2d 891.

[6, 7] Ordinarily "account" means, "A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation." Black's Law Dictionary, 3d Ed. Accounting usually is striking a balance between debits and credits showing a balance due, if any. To apply these meanings to the words used in

the section might destroy its value to an entruster and defeat its purpose which would seem to be to continue the lien of the entruster and transfer it to any goods taken by the trustee in part payment of the purchase price of the goods described in the trust receipt. Sometimes it would be impossible to demand an accounting, as that term is generally understood, from a trustee who had received money on a sale and had disappeared (as appears in some reported cases) with the money.

[8, 9] At the early common law there was an action called "account" or "account render". While this form of action fell into disuse in England it was adopted in some of the States of the Union. It was used to compel one occupying a confidential relation to render over to the other that which was his due. See *Field v. Brown*, 146 Ind. 293, 45 N.E. 464. Possibly, growing out of this form of action the word "account" is occasionally given the meaning of rendering over or paying or delivering to a creditor that which is due from a debtor. Also the term "accounting" is sometimes used to mean the payment of the amount due. *Pyatt v. Pyatt*, 46 N.J. Eq. 285, 18 A. 1048.

[10] If we give the words "account" and "accounting", as used in the section, these definitions, the meaning of the language used becomes clear. It is simply this: If the trustee is given liberty of sale and is required by the trust receipt to render over to the entruster any money, goods or other thing of value received as consideration in the sale of the entrusted goods, the lien of the entruster passes to such goods as may be identified, if the entruster within ten days demands delivery of such goods.

[11] In this case there was no proof of a demand by defendant for the delivery of the goods. Defendant took possession of the automobiles in the possession of Bowman, including the Plymouth. This taking should come within the meaning of the words used in the section, as, taking possession would constitute payment of the amount due, or at least a part of it. Under these circumstances it cannot be held that the lien of the entruster did not pass to and become fixed on the Plymouth coupe.

However, this does not settle the rights of the parties as there is an important rule of equity that must be considered. It is this: "Where one of two innocent persons must suffer by the act of a third, he, by

whose negligence it happened, must be the sufferer." Sec. 3543, Civil Code.

[12] This maxim has been applied by our courts in deciding cases involving trust receipts. See *Commercial Credit Co. v. Barney Motor Co.*, 10 Cal.2d 718, 76 P.2d 1181; *National Funding Corporation of Calif. v. Stump*, Cal.App., 133 P.2d 855.

In the instant case neither finance company had any actual knowledge or notice of the lien of the other on either automobile. As far as the evidence discloses both were acting in entire good faith in their dealings with Bowman. Each parted with money under the belief that it was obtaining a valid first lien on an automobile as security. Then, where do the equities lie under the maxim we have quoted?

[13] Defendant permitted the Pontiac to be placed in the possession of Bowman with express authority to sell it for cash or upon such terms as it might approve in writing. The trust receipt at least contemplated that Bowman might sell it for a used car taken in part payment, with the balance paid in cash. This is exactly what Bowman did and defendant must have realized that if there was a used car "trade in" Bowman would be given the possession of it and the evidence of its ownership—the "pink slip". Thus defendant should have realized that it was placing Bowman in a position to work a fraud if he proved unfaithful to the trust and confidence imposed in him. He might misappropriate the money he received and which he should have paid to defendant, or he might encumber the used car taken on the trade and misappropriate those funds. In the instant case he did both of those things. Defendant maintains that plaintiff, Bowman's innocent victim, should suffer the loss instead of itself, the party which made the fraud possible by its misplaced confidence in Bowman's integrity by placing in his hands the means to commit the fraud.

In *Phelps v. American Mortgage Co.*, 40 Cal.App.2d 361, 104 P.2d 880, 883, it is said:

"It is to be noted that the Civil Code section uses the word 'negligence'. It is appellants' theory that they are not chargeable with negligence, but only with misplaced confidence in a trusted agent, and that misplaced confidence is not negligence. It is urged that, under the cases, the doctrine that a person is estopped from claiming title when he has entrusted another with indicia



of ownership only applies where it is shown that the owner of the property has been guilty of actual negligence. Appellants point out that the trial court did not find that they were guilty of actual negligence, but found, in effect, that they were guilty of misplaced confidence and that this constituted negligence. It is urged that this finding or conclusion cannot be supported.

"After reading the cases, and giving consideration to their rationale, we are convinced that, where an owner deposits his property with another and gives the depository such indicia of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such property and parts with value in reliance thereon, the third person will be protected even though the true owner is guilty of no more than misplaced confidence. Such misplaced confidence must be held to be negligence within the meaning of the maxim above referred to."

See, also, *Bank of America N. T. & S. A. v. National Funding Corp.*, 45 Cal.App.2d 320, 114 P.2d 49.

In the instant case defendant certainly must be found to have misplaced its confidence in Bowman and that plaintiff suffered loss thereby. As misplaced confidence amounts to negligence under the facts here, we must hold that the case comes within the language of section 3543 of the Civil Code and that defendant and not plaintiff must suffer the loss caused by the action of Bowman.

To escape this conclusion defendant urges that plaintiff had knowledge of sufficient facts to put it upon its inquiry; that had it inquired it would have learned that the Plymouth was not free from lien. The facts urged to support this argument may be summarized as follows: Plaintiff started flooring used cars for Bowman in April or May, 1940. It did not have sufficient capital to floor new cars for Bowman, and knew he had flooring contracts for new cars elsewhere. It knew that the Plymouth had been taken in on a trade for a new car.

[14] In *Commercial Credit Co. v. Barney Motor Co.*, supra [10 Cal.2d 718, 76 P.2d 1183], it is said: "The decisions in this state do not warrant a holding that mere knowledge of the general practice of 'flooring' cars is sufficient to place on inquiry one about to part with value. On the contrary, the cases herein cited support the conclusion that one in the position of the bank in this case who has parted with value

without actual notice, or without knowledge of facts to put it on inquiry, is protected as against the claim of the entruster under a trust receipt."

[15] Nor do we believe that the fact that the Plymouth was being traded in on a new car was sufficient to put plaintiff on its inquiry without proof of something to indicate to plaintiff that Bowman would not properly apply the money he received from plaintiff. Taking a used car in on trade for a new car is a common practice instead of the exception in the automobile business. Had Bowman properly applied the money he received from Kimzey and from plaintiff, the lien of defendant on the Pontiac would have been paid and this case would not have been brought. Plaintiff had been flooring cars for Bowman for about eight months and as far as the record shows those dealings had been satisfactory. It had no reason to suspect that Bowman would misapply the money it paid him, even assuming that knowledge of his flooring contracts with another should have caused suspicion in this case. Again we have the misplaced confidence of defendant in Bowman as the sole cause of the loss.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,  
concur.



58 Cal.App.2d 789

COOPER et ux. v. DEON.

Civ. 13884.

District Court of Appeal, Second District,  
Division 3, California.

May 25, 1943.

# 1. Appeal and error ⇐106, 870(2)

An order denying a continuance to defendant was not an "appealable order" but it could be reviewed on appeal from order denying defendant relief from her default.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

# 2. Appeal and error ⇐1024(4)

Conflict in affidavits in support of, and in opposition to, motion to set aside a de-

fault judgment presented problem for determination of trial court and not the appellate court.

### 3. Judgment ¶162(4)

Where defendant's motion to set aside a default judgment was supported by affidavits that defendant was ill and unable to read, and that she did nothing because plaintiff's attorney who served summons failed to return, as promised, to talk to her, denial of motion was not an abuse of discretion.

### 4. Continuance ¶25

Where continuance was sought to give defendant opportunity to meet new matters in plaintiff's counter affidavits filed in opposition to defendant's motion to set aside default judgment, denial of continuance was not error, where old matters warranted denial of motion to set aside default judgment.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action to quiet title by O. W. Cooper and wife against Amanda Deon. From an order denying motion of defendant to set aside a default judgment and motion to permit defendant to answer, and from an order denying defendant a continuance, the defendant appeals.

Appeal from order denying a continuance dismissed and order denying relief from default affirmed.

Michael Rudolph and David P. Hatch, both of Los Angeles, for appellant.

Willis O. Tyler and Clarence A. Jones, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1] The defendant appeals from (1) an order denying her motion to set aside a default judgment, taken against her in a quiet title action, and her motion to permit her to answer, and (2) from an order denying her a continuance in order that she might file "reply affidavits as to new matters" set up in plaintiffs' counter affidavits. The latter is not an appealable order, but may be reviewed on the appeal from the order denying the defendant relief from her default.

In support of her motion the defendant filed two affidavits, her own and that of her physician. They offer as excuses for her disregard of the summons and complaint admittedly served upon her on November 12, 1941, the claims that she was suffering with a condition which rendered her inactive and frequently kept her in bed; that she was in bed when served; that she was unable to read; and that she did nothing about the papers served upon her because in reply to her inquiry, "What is the paper for," plaintiffs' attorney, who served the summons, replied that he would be back and talk to her about it, which he did not do. She, therefore, believed that a prior conversation with one of the plaintiffs and their attorney had convinced them that they had no case.

Plaintiffs' affidavits flatly contradict those of the defendant except that they do not refute her claim that she was ill and that at times she may stay in bed and they may leave in doubt her inability to read. She was out attending her chickens when served, was advised that if she contemplated resisting the quiet title action she should consult a lawyer, to which she replied that there was nothing she need do about it, and she did nothing about it for over six months, almost six months from the entry of her default.

[2-4] In the premises the conflict in the affidavits was a problem for the trial court, not for this court, to resolve (In re Estate of McCarthy, 1937, 23 Cal.App.2d 398, 401, 73 P.2d 914, and cases cited) and there appears no abuse of discretion in denying the motion to relieve the defendant from the consequences of her default. Weinberger v. Manning, 1942, 50 Cal.App.2d 494, 123 P.2d 531. Nor does an abuse of discretion appear in the trial court's order denying a continuance to give the defendant an opportunity to meet any new matters in plaintiff's counter affidavits. Were the new matters successfully answered the "old" matters would still have remained, warranting a denial of her motion to set the default and default judgment aside.

The appeal from the order denying defendant a continuance is dismissed; the order denying her relief from her default is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

58 Cal.App.2d 811

**FERGUSON et al. v. FERGUSON et al.**  
Civ. 12394.

District Court of Appeal, First District,  
Division 2, California.

May 26, 1943.

Hearing Denied July 22, 1943.

**1. Executors and administrators** §314(1),  
315(6)

Distribution of a decedent's estate is a "proceeding in rem" and a decree of distribution having become final is conclusive as to the rights of those interested in the estate and is not subject to collateral attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Rem".

**2. Trusts** §95

Where distributees, through extrinsic fraud practiced in probate proceedings, obtain property to which they are not entitled, equity will do justice not by overthrowing decree of distribution but by declaring that distributees hold the property in trust for rightful owners.

**3. Trusts** §357(1)

Purchasers for value and without notice of fraud by which their vendors procured a decree distributing property to them as heirs of deceased owner to exclusion of other heirs held the property free from any equity in excluded heirs and could not be charged as "trustees" for the benefit of such heirs.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

**4. Trusts** §371(2)

Complaint alleging that certain heirs through fraud procured a decree distributing entire estate to them to exclusion of other heirs and that defendants by reason of such fraud gained property to which excluded heirs were entitled without alleging that defendants were guilty of any fraud or were not purchasers for value without notice of fraud or rights of excluded heirs did not state a cause of action charging defendants as "trustees" for benefit of excluded heirs.

**5. Trusts** §371(8)

Where pleading shows that defendants who are themselves innocent of any wrongdoing hold legal title to property,

plaintiff seeking to establish a superior equitable title must plead and prove that defendants are not innocent purchasers for value.

**6. Trusts** §372(1)

An innocent purchaser for value seeking to establish a superior equitable right against holder of legal title to property has the burden of pleading and proving his rights as a bona fide purchaser.

**7. Executors and administrators** §315(5)

A final decree distributing intestate decedent's entire estate to certain heirs to the exclusion of others, though decree was obtained through fraud, divested the legal title to intestate's property which vested in all the heirs at death and vested legal title in the distributees named in decree. Probate Code, § 1021.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Clarence L. Ferguson and others against Clarence Ferguson and others to enforce an involuntary trust. From a judgment dismissing their complaint as to Lillian Ostrander and certain other defendants, following the sustaining of demurrers interposed by such defendants, plaintiffs appeal.

Judgment affirmed.

J. J. Doyle, of San Francisco, for appellants.

F. Eldred Boland and John H. Riordan, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiffs appeal from a judgment dismissing their complaint as to defendants Knight, Boland, Riordan, Kilmartin, Radil, Lillian Ostrander and John Harkins, following the sustaining of demurrers interposed by these defendants to their complaint.

The complaint was in two counts. The first count is directed only against certain other defendants, Ferguson, Sloan and White. As to these three defendants it is alleged in the first count that they are heirs of one Emma Eleanor Ferguson White, who died in 1937, and that plaintiffs are likewise heirs of such decedent. It is further alleged that such three defendants, knowing of the existence and whereabouts of the plaintiffs and of their interest in the



estate of the decedent, entered into a conspiracy to conceal from the probate court the existence and rights of the plaintiffs, and did by misrepresentation and concealment succeed in having the entire estate of decedent distributed to themselves to the detriment of plaintiffs. We may assume, without deciding, that the allegations of the first count sufficiently state a cause of action against these three defendants based on extrinsic fraud.

The second count, which attempted to state a cause of action against the respondents on this appeal, after incorporating by reference the allegations of count 1, contains the following allegation: "That defendants by reason of the heretofore mentioned allegations, have gained by accident, mistake and particularly the heretofore pleaded wrongful acts of defendants Clarence Ferguson, Dorothy Lambert Sloan \* \* \* and Pearl Gillehan White \* \* \* property to which plaintiffs are rightfully and legally entitled; that none of the defendants have any, better or some other right thereto and therefore, plaintiffs allege any property received by defendants from said estate is received by said defendants as involuntary trustees of the property gained as and for the benefit of plaintiffs who would otherwise have had it."

[1,2] The action is one to enforce an involuntary trust. It is not, and cannot be, a collateral attack on the decree of distribution itself. The law of this state on the subject is well summarized in *Estate of Madsen*, 31 Cal.App.2d 240, at page 243, 87 P.2d 903, at page 905:

"It is well settled that a decree of distribution which has become final is conclusive as to the rights of those interested in the estate. *Manning v. Bank of California*, 216 Cal. 629, 15 P.2d 746; *Goad v. Montgomery*, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145; *Crew v. Pratt*, 119 Cal. 139, 51 P. 38, 42. In the last-named case, it is said: "'The distribution of the estate of a deceased person is a proceeding in rem, \* \* \* and the action of the court in making the distribution binds the whole world, and is equally conclusive upon every claimant, whether his claim is presented, or whether he fails to appear, subject only to be reversed, set aside, or modified on appeal; and its decree cannot be collaterally attacked for any error committed therein.'"

"It is, of course, equally well settled that where, through extrinsic fraud prac-

ticed in probate proceedings, distributees have obtained property to which they are not entitled, equity will do justice not by overthrowing the decree of distribution but by declaring that the distributees hold the property in trust for the rightful owners. *Simonton v. Los Angeles Trust & Sav. Bank*, 192 Cal. 651, 221 P. 368; *Purinton v. Dyson*, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; *Wingerter v. Wingerter*, 71 Cal. 105, 11 P. 853. In *Campbell-Kawannanaka v. Campbell*, 152 Cal. 201, 92 P. 184, 187, the court said: "This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists."

While the complaint does not allege specifically how the respondents deraigned their title to the property of the estate it does allege that they gained it "by accident, mistake and particularly the heretofore wrongful acts of defendants" Ferguson, Sloan and White. The complaint also alleges a final decree of distribution in the estate of Emma Eleanor Ferguson White, deceased. It is not alleged that respondents were themselves guilty of any fraud or wrongdoing. It must therefore be spelled out of the complaint that respondents took title under and by virtue of the decree of distribution.

[3] It is clear that if respondents were purchasers for value and without notice, taking their title through the decree of distribution which constitutes a muniment of title immune to collateral attack, they cannot be charged as trustees and they hold the property free from any equity in plaintiffs. *Newport v. Hatton*, 207 Cal. 515, 520, 279 P. 134; *Garrison v. Blanchard*, 127 Cal.App. 616, 622, 16 P.2d 273; *Marlenee v. Brown*, Cal.Sup., 134 P.2d 770.

[4-6] It is nowhere alleged in the complaint that the respondents, or any of them, were not purchasers for value or that they took their title with notice or knowledge of the alleged wrongdoing of their fellow defendants or of any rights of the plaintiffs. Where defendants, who are themselves innocent of any act of wrongdoing, are shown by the pleading to have acquired the legal title to property, it

is incumbent upon a plaintiff, seeking to establish a superior equitable title, to plead and prove that the defendants are not innocent purchasers for value. In this respect the rule differs from the case where an innocent purchaser for value seeks to establish a superior equitable right against the holder of the legal title, in which case the burden of pleading and proof is on the one asserting his rights as a bona fide purchaser. The distinction, with cases in support thereof, is clearly stated in *Pellerito v. Dragna*, 41 Cal.App.2d 85, at page 91, 105 P.2d 1011, at page 1014: "The pleading shows on its face that respondents were the holders of the legal title to a half interest in the property, and as to this interest the burden was upon appellant to plead and prove that she was a bona fide purchaser. *Bell v. Pleasant*, 145 Cal. 410, 78 P. 957, 104 Am.St.Rep. 61; *James v. James*, 80 Cal.App. 185, 251 P. 666. But as to the other half interest the pleading shows on its face that appellant was the holder of the legal title; that respondents' claim was of an equitable character, and the burden of pleading and proof, as to such interest, rested upon respondents. *Bell v. Pleasant*, supra; *Kowalsky v. Kimberlin*, 173 Cal. 506, 160 P. 673; *Warnock v. Harlow*, 96 Cal. 298, 31 P. 166, 31 Am. St.Rep. 209; *Wyrick v. Weck*, 68 Cal. 8, 8 P. 522; *Hawke v. California Realty, etc., Co.*, 28 Cal.App. 377, 152 P. 959."

The rule of pleading, and the distinction between the cases of plaintiffs relying on a legal and an equitable title, is elaborately discussed in *Bell v. Pleasant*, supra. See also in addition to the cases cited in the quotation from *Pellerito v. Dragna*, supra; *Estate of Lyon*, 163 Cal. 803, 806, 127 P. 75; *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 660, 661, 82 P. 317; *Dimity v. Dixon*, 74 Cal.App. 714, 719, 241 P. 905.

[7] Appellants seek to avoid the effect of this rule by citing cases which hold that the legal title to the property of an intestate decedent vests in the heirs upon death, subject only to administration. The difficulty with appellants' argument is that the effect of the decree of distribution was to divest such legal title and to vest the legal title by the judicial decree in the distributees named therein. Prob.Code sec. 1021; *Eisenmayer v. Thompson*, 186 Cal. 538, 541, 199 P. 798; *Manning v. Bank of California*, 216 Cal. 629, 634, 15 P.2d 746; *Crew v. Pratt*, 119 Cal. 139, 149, 150, 51

P. 38; *William Hill Co. v. Lawler*, 116 Cal. 359, 361, 362, 48 P. 323.

We are satisfied that the complaint failed to state a cause of action against respondents for the reasons herein discussed.

Judgment affirmed.

NOURSE, P. J., and SPENCE, J., concur.



58 Cal.App.2d 573

HOUK et al. v. WILLIAMS BROS., Limited.

Civ. 6772.

District Court of Appeal, Third District,  
California.

May 12, 1943.

#### 1. Sales ⇐359(1)

Evidence supported finding that plaintiffs were owners of land from which asparagus crop was to be produced, so as to be entitled to recover their share thereof from defendant who agreed to purchase the crop from the tenant on the land, notwithstanding a document indicating that other relatives of plaintiff had interest in the land, where such relatives were not parties to the purchase contract and were making no claim to the price.

#### 2. Alteration of Instruments ⇐18

A material alteration of a contract, without consent of party who has already signed and delivered it, renders instrument "voidable" as to such nonconsenting party. Civ.Code, § 1580.

See Words and Phrases, Permanent Edition, for all other definitions of "Voidable Contract".

#### 3. Contracts ⇐41

A contract voidable for lack of consent may be ratified by subsequent consent. Civ.Code, § 1588.

#### 4. Alteration of Instruments ⇐13

The rule that parties affected by a material alteration in contract must disavow within reasonable time after learning of alteration or be bound by contract as al-

tered is applicable to either sealed or unsealed instruments. Civ.Code, § 1629.

#### 5. Contracts ⇨35, 42

Ordinarily, both signatures of parties to sealed instrument and delivery are necessary to give instrument validity.

#### 6. Alteration of Instruments ⇨13

When obligor ratifies altered instrument, redelivery, within rule that a redelivery of sealed instrument by obligor after it has been altered will make it binding in altered form, is implied.

#### 7. Alteration of Instruments ⇨13

Where contract for purchase of asparagus crop from tenant erroneously named former owners as owners, and, after signature by purchaser and tenant, plaintiffs signed as owners, and purchaser was advised of change and thereafter acted under contract and no fraud was charged, purchaser "ratified" contract and was "estopped" from subsequently denying validity thereof. Civ.Code, § 1588.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Ratify".

#### 8. Corporations ⇨432(12)

In action against corporation to recover purchase price of asparagus crop, evidence that corporate officer in first instance negotiated and signed contract in behalf of corporation sustained finding that such officer had authority to accept and ratify alteration of contract.

#### 9. Pleading ⇨132

New matter constituting a special defense must be specially pleaded in answer, notwithstanding rule that a liberal construction of pleadings with object of securing substantial justice should prevail.

#### 10. Pleading ⇨291(2)

Statutes relating to pleading of defense challenging genuineness and due execution of written instrument which is basis of a suit were enacted on theory that such challenges become special defenses when instrument is included in pleading or attached thereto as an exhibit and compliance with such statutes is required, under such circumstances, to raise issue of lack of genuineness or due execution of instrument. Code Civ.Proc. §§ 447, 448.

#### 11. Alteration of Instruments ⇨29

In action to recover from buyer landowner's share of price of crop purchased

from tenant, evidence that buyer accepted contract as genuine after landowner had substituted his name for that of former owner in signed contract sustained judgment for landowner.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by B. F. Houk and another against Williams Brothers, Limited, to recover plaintiffs' share of the purchase price of an asparagus crop. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Wm. B. Chaplin, of Oakland, for appellant.

F. M. Brack, of Modesto, for respondents.

THOMPSON, Justice.

Judgment for \$678.57 was rendered in favor of the plaintiffs for their share of the purchase price of an asparagus crop to be produced in the year 1939, pursuant to the terms of a tripartite written contract therefor. From that judgment the defendant, Williams Bros., Ltd., has appealed.

It is contended the contract is void because the partnership name, under which plaintiffs were doing business, was substituted for the names of the second parties, C. Lee Jones and S. C. Legare, which appeared therein at the time the defendant signed the document. It is also asserted the finding that plaintiffs were the owners of the land in question is not supported by the evidence.

The plaintiffs, B. F. Houk and R. P. Houk, were conducting a farming business under the name of Houk Bros. November 19, 1934, C. Lee Jones and S. C. Legare owned the 100 acre ranch in Stanislaus County, which is involved in this suit. On that date they executed a twelve-year lease of that land to Thomas Gill for the purpose of raising asparagus, by the terms of which lease Mr. Gill agreed to pay them \$2,000 per annum for the period of two years, after which the lessors were to receive in lieu of the cash rental thirty per cent of the asparagus produced. Prior to January 26, 1939, the plaintiffs acquired said property. The defendant corporation was engaged in buying and marketing farm produce. On the last-mentioned date Williams Bros., Ltd., as party of the third part, entered into a written agreement with



Thomas Gill, as first party and the copartnership, Houk Bros., as second party, to purchase the crop of asparagus growing on said ranch in the year 1939, for the sum of \$2,000, thirty per cent of which sum was to be paid to Houk Bros., on specified dates, and the balance to Thomas Gill. That contract contained the following paragraph: "It is understood and agreed, that the third party [Williams Bros., Ltd.] is buying said crop standing in the field at the date hereof, title thereto now passing to and shall hereafter be vested in said third party, the harvest thereof to be at the cost and expense of said third party. Provided, however, that the first party [Thomas Gill] hereby promises and agrees to continue with and perform all necessary and normal operations of asparagus growers as to the care of the ground and the crop from the date hereof to the end of the harvest period, at his own cost and expense. If said party fails so to do, the third party may have any such necessary work done and charge the cost thereof against the account of the first party."

The contract was negotiated between Thomas Gill and M. P. Williams, one of the members of the corporation. It was drawn in triplicate by the defendant's attorney, after which each copy was immediately signed by Mr. Williams in behalf of the corporation on January 26, 1939, and delivered to Thomas Gill to sign and to procure the signature of the said second parties. At the time these instruments were signed by Mr. Williams, it was erroneously recited that the former owners of the land, C. Lee Jones and S. C. Legare, were the parties of the second part. Probably this inadvertent statement occurred on account of the belief on the part of the members of the corporation or its attorney that the designated second parties owned the property since they executed the lease to Thomas Gill in 1934, and because they had no knowledge of the subsequent acquisition of the property by the plaintiffs. Mr. Gill, however, recognized Houk Bros. as the owners of the real property and the lease. Mr. Gill did not at first discover the error in the written instruments. He took the contracts to his attorney at Tracy for inspection, and subsequently signed each copy that same day. Two days later he presented them to B. F. Houk for acceptance and signature. Mr. Houk noticed the mistake in the names of the second parties in the contracts and told Gill they would have to be changed. He took the instru-

ments to a notary public who at his request erased the names of Jones and Legare from the first paragraph and substituted that of Houk Bros. as party of the second part. Each copy of the agreement was then signed by B. F. Houk in behalf of the partnership, and he then handed one of them to Thomas Gill for delivery to the defendant. That signed document, with the names of the second parties changed to Houk Bros., was delivered by Mr. Gill at the office of the defendant in Sunnyvale, where it remained for several days, without criticism of said alteration of the contract. On February 10th, Mr. Gill again called at the defendant's office in Sunnyvale where he met M. P. Williams, who discussed with him the reason for changing the names of the second party to that of Houk Bros. Williams was then fully informed of the necessity of making that change. Mr. Williams, in the presence of Thomas Gill, called his attorney on the telephone and inquired regarding the legal effect of that change, on the validity of the contract. After fully discussing that matter Williams, in behalf of the corporation, acquiesced in the change and adopted the contract as so altered, saying, "Well, \* \* \* everything looked all right." Thereafter, on February 28th, the defendant sent to the ranch materials for the construction of 2,000 crates in which to pack and ship its asparagus. After the discussion with M. B. Williams regarding the change of names, no intimation of the defendant's dissatisfaction with the contract was expressed for sometime. The conduct of the representatives of defendant led plaintiff and Thomas Gill to believe the corporation intended to fulfill the contract and harvest its crop. March 2nd, Mr. Gill again met M. B. Williams and told him he was going to assign his interest in the contract to a local bank to raise funds for necessary use. Williams persuaded him not to assign the contract to a bank, by promising Gill the corporation would advance to him, under their contract, the money he required. The sum of \$150 was then actually advanced to Gill, but it appears that payment was credited on another transaction between them. About March 6th, M. P. and Lee Williams came to the ranch, and for the first time told Mr. Gill that "the ground was too dry and wasn't fit to grow asparagus." They then told him they were not satisfied with the purchase of the asparagus crop. The change of name in the contract was not then mentioned.

March 9th, the corporation wrote a letter to Mr. Gill, notifying him of its repudiation of the contract on the grounds that he had failed to cultivate the asparagus according to the terms of the instrument, and because the document had been altered by changing the names of the second parties after the corporation had executed the contracts. The letter asserted that the contract was therefore void. The defendant failed and refused to harvest or pay for the crop. After ineffectual correspondence, the plaintiffs brought this suit against the defendant on November 22, 1940, to recover their share of the purchase price of the asparagus crop of 1939, pursuant to the terms of the written contract as altered and accepted by the respective parties. Thomas Gill was not a party to this action.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiffs in every respect. The court determined that plaintiffs were the owners of the land; that the contract was duly executed and accepted and adopted by the defendant corporation after the alteration of the instrument occurred, with full knowledge thereof; that the contract was therefore valid and binding, and that the defendant was indebted to plaintiffs in the sum of \$678.57, no part of which had been paid. Judgment was accordingly rendered for that sum in favor of plaintiffs. From that judgment this appeal was perfected.

[1] There is adequate evidence to support the findings that the plaintiffs were the owners of the ranch at the time of this action. B. F. Houk testified to that effect, without objection. The affidavit of F. M. Brack, filed in behalf of plaintiffs on a motion for new trial, avers that from and after December 18, 1936, the plaintiffs "were the owners of and entitled to all rents, issues and profits of all the land." The letter, dated April 11, 1941, from Stanislaus County Title Co. to William B. Chaplin, attorney for the defendant, merely indicates that other relatives of the plaintiffs had undivided interests in the land. That letter, at most, creates a conflict of evidence on that issue. The other relatives are making no claim of interest to any part of the purchase price of the crop. They were not parties to the contract. The finding that the plaintiffs are the owners of the property is sufficiently supported by the evidence.

[2, 3] It is true that a material alteration of a contract without the consent of a party who has already signed and delivered it, renders the instrument voidable as to such non-consenting party. Sec. 1580, Civ.Code; *Walsh v. Hunt*, 120 Cal. 46, 52 P. 115, 39 L.R.A. 697; *Woodard v. Grover*, 156 Cal. 581, 105 P. 736; 6 Cal.Jur. 230, sec. 152; 6 Williston on Contracts, Rev.Ed., 5312, sec. 1891, et seq. A contract which is voidable for lack of consent may, however, be ratified by subsequent consent. Sec. 1588, Civ.Code; *Dool v. First National Bank of Calexico*, 107 Cal.App. 585, 589, 290 P. 478; 6 Cal.Jur. 93, sec. 57; 6 Williston on Contracts, Rev.Ed., 5319, secs. 1896 and 1897. In the text last cited it is said: "Ratification, subsequent to the alteration, has as full effect as authority originally granted, and ratification may be shown by any conduct from which assent can fairly be implied. Silence may be enough. It has been well said, 'The rule is just and supported by the authorities that, where a document has been altered and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered.'"

[4-6] The foregoing rule is applicable to either sealed or unsealed instruments, in jurisdictions where that distinction has been abolished by statute. In California the distinction between sealed and unsealed instruments has been abolished. (Sec. 1629, Civ.Code.) Ordinarily, not only are the signatures of the parties to a sealed instrument necessary, but there must also be a delivery of the document to give it validity. A redelivery of a sealed instrument by the obligor after it has been altered will make it binding in its altered form. But redelivery after the alteration is implied when the obligor subsequently ratifies the instrument. Section 1897 of 6 Williston on Contracts, *supra*, says in that regard: "There is always a delivery when the maker of a deed indicates his assent to be bound by it as a completed instrument." It is further said in that section that there is "no difficulty in finding delivery when the maker after an alteration has been made ratifies it."

[7] In the present case the alteration was made to recite the fact, as the court found, that Houk Bros. was the real owner

of the ranch and entitled to an interest in the purchase price of the asparagus crop. It was evidently to the advantage of the defendant to execute its contract of purchase with the real parties who were interested in the crop. No fraud was alleged or proved or relied upon with respect to that substitution of parties to the contract, or otherwise. Assuming, without so deciding, that the substitution of names constituted a material alteration, the contract as so changed was subsequently adopted and ratified with full knowledge of that change on the part of the defendant. The appellant is therefore bound by the instrument as it was altered. Not only did the defendant, through M. B. Williams, its duly authorized representative, after discussion of the legal effect of the change with its attorney, say to Thomas Gill, "everything looked all right," but for several weeks thereafter no criticism of that change was made. On the contrary, the defendant sent to the ranch some three weeks thereafter materials for constructing 2,000 crates in which to pack and ship its asparagus, and persuaded Gill not to assign his interest in the contract to a bank, promising him it would advance \$300 on the contract. These declarations and conduct constituted adequate evidence of assent and ratification of the contract as altered, and estopped the defendant from subsequently denying the validity of the contract on that account.

The case of *Walsh v. Hunt*, supra, upon which the appellant relies, was a suit to foreclose a note secured by mortgage. In that case the defendant, Emma E. Hunt, after signing the note and mortgage containing figures in lead pencil, representing the principal amount of the indebtedness and the rate of interest to be charged, delivered it to Hughes, a real estate agent, to procure the due execution of the instruments by the plaintiff, Walsh, without authorizing an alteration of those lead pencil figures. Both the principal sum and the rate of interest were subsequently changed by erasing the lead pencil figures and inserting others to the detriment of the payer. For the period of a year thereafter, Emma E. Hunt was unaware of those alterations. She never accepted or ratified those alterations. In spite of the foregoing facts, the court rendered judgment for the plaintiff in accordance with the unauthorized alterations of the note and mortgage. The Supreme Court properly re-

versed the judgment on the theory that the alterations were material and that they were neither authorized nor ratified. That case is not in point.

The case of *Woodard v. Grover*, supra, upon which the appellant also relies, was suit for trespass on timber land in San Mateo County. The defendants answered, attempting to justify the cutting and removal of timber under the terms of a "purported contract." That proposed contract was signed in duplicate by the plaintiff, in which M. A. Grover and M. A. Littlefield were designated as parties of the second part, and delivered to an agent to procure their signatures. Without authority, the agent subsequently substituted for the name of M. A. Grover that of E. S. Grover, her daughter. It appears that M. A. Grover, the wife of Dwight W. Grover, refused to sign the contract, and, without authority, the name of the daughter, E. S. Grover, was substituted. She signed the contract. That change of parties was not assented to nor ratified. The Supreme Court said [156 Cal. 581, 105 P. 737]: "The court was justified in concluding that there was no such unqualified ratification by plaintiff of the mutilated instrument as gave it validity and make it his contract." The judgment was affirmed.

That case is not in point. It is readily distinguishable from the present case, in which it satisfactorily appears that with full knowledge of the alteration complained of the defendant accepted and ratified the contract as altered, by both declarations and conduct.

[8] In the present case there is ample evidence to support the conclusion that M. P. Williams, who was an officer of the corporation, had authority to accept and ratify the alteration of the contract. He negotiated the contract to purchase the crop in the first instance, and he signed the contract in behalf of the corporation.

Moreover, there is a serious question as to whether the defendant may not be deemed to have admitted the genuineness and due execution of the contract, under section 447 of the Code of Civil Procedure, by its failure to specially plead in the answer a lack of genuineness and due execution. That section provides: "When an action is brought up on a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed



thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified."

[9,10] Paragraph IV of the second amended complaint alleged merely that "plaintiffs and defendants entered into a written contract of sale, a copy of which contract is attached hereto, marked Exhibit 'A', and made a part hereof." The answer failed to specially deny that the contract, which appears on its face to be genuine and duly executed, was defective for either of those reasons, or at all. The answer merely denied generally "each and every allegation" of paragraph IV of the complaint. While it is true that a liberal construction of pleadings with the object of securing substantial justice should prevail (21 Cal.Jur. 53, sec. 30), it has been held that new matter constituting a special defense must be specially pleaded in the answer. 21 Cal.Jur. 136, sec. 91. Sections 447 and 448 of the Code of Civil Procedure appear to have been enacted on the theory that the "genuineness and due execution" of a written instrument which is the basis of a suit become special defenses when the instrument is included in the pleading, or is attached thereto as an exhibit. Compliance with the provisions of those sections is required, under such circumstances, to raise the issue of a lack of genuineness or due execution of the instrument. *Sloan v. Diggins*, 49 Cal. 38; *Williams v. Nieto*, 98 Cal.App. 615, 618, 277 P. 513; 21 Cal. Jur. 136, sec. 91; 29 Cal.Law Rev. 254. In the *Williams* case, *supra*, which was a suit upon a note and mortgage signed by mark, and witnessed only by one person's signature, contrary to section 17 of the Code of Civil Procedure, the court held that the due execution of the instruments was deemed to have been admitted by the defendant by his failure to specially deny the due execution in his answer. The court said in that regard [98 Cal.App. 615, 277 P. 515]: "This contention [of a lack of due execution] is based upon the fact that Suzy Nieto's signature to both the note and mortgage is by mark and there is only one witness to her mark. Section 17, Code Civ.Proc. The complaint is verified and contains a copy of the note and mortgage. The answer is also verified, but does not deny the execution of either the note or mortgage. Therefore, the genuineness and due execution of both the note and mortgage are admitted."

[11] However, it is not necessary for us to determine that the lack of genuineness and due execution must be specially pleaded under the circumstances of this case, and we refrain from doing so, because there is ample evidence to show that the defendant approved and accepted the contract as genuine and binding, after the names of the second parties were changed.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concurred.



58 Cal.App.2d 625

PEOPLE v. GIN SHUE.

Cr. 2236.

District Court of Appeal, First District,  
Division 1, California.

May 20, 1943.

Rehearing Denied June 4, 1943.

Hearing Denied June 17, 1943.

#### 1. Poisons ☞9

Evidence presented question for jury as to whether defendant was guilty of unlawful possession of opium. *St.1941, p. 2820, § 11160.*

#### 2. Criminal law ☞1159(2)

Where evidence supported inference that defendant was guilty of offense charged, although it would likewise support a contrary finding, District Court of Appeal had no power to disturb the judgment on ground of insufficiency of evidence.

#### 3. Criminal law ☞1189

District Court of Appeal had no power to grant petition seeking a new trial or a remand of case to trial court with directions to repass on motion for new trial, based on facts alleged to have occurred subsequent to date appeal was perfected, in absence of any allegation that prosecuting officials or trial court conspired or participated in producing or knowingly or otherwise produced perjured testimony. *Const. art. 6, § 4b.*

#### 4. Poisons ☞9

An information charging that defendant violated Section 11160 of the Health

and Safety Code in that he wilfully, unlawfully and feloniously had in his possession on a certain date a preparation of opium contrary to statute was sufficient to conform to requirements of Penal Code. Pen.Code, §§ 950-952; St.1941, p. 2820, § 11160.

**5. Criminal law ⇨377**

Where defendant's character witnesses were asked on direct examination as to their knowledge of defendant's reputation in relation to traits involved in the offense charged, trait of being a law abiding citizen was necessarily included within the questions asked witnesses, and witnesses were not unduly limited or misled.

**6. Criminal law ⇨377**

A defendant may produce witnesses who may be questioned as to their knowledge of defendant's reputation as a law abiding citizen.

**7. Witnesses ⇨274(1)**

When a witness has testified as to his knowledge of defendant's reputation as a law abiding citizen, witness' credibility is placed in issue.

**8. Witnesses ⇨274(2), 398(3)**

A method of testing accuracy and weight of witness' statement as to existence of defendant's good reputation is for the prosecution, in good faith, to ask witness whether he has heard of certain rumors, occurrences or charges as to specific acts of misconduct of defendant relating in general to the traits involved in the charge, including defendant's reputation as a law abiding citizen, but prosecution is confined to answer given by witness and can inquire no further.

**9. Criminal law ⇨380**

Defendant's general misconduct cannot be inquired into by either prosecution or defense as a fact.

**10. Criminal law ⇨673(3)**

Where prosecution asks witness who testified as to defendant's good reputation as to whether witness has heard of certain rumors, occurrences or charges as to specific acts of misconduct of defendant relating in general to traits involved in the charge for purpose of testing witness' credibility, trial judge should, if so requested, instruct jury that prosecution's questions do not prove existence of the fact of mis-

conduct and that questions merely have relevancy on issue as to witness' credibility if he admits knowledge of the misconduct.

**11. Witnesses ⇨274(1)**

The cross-examination by prosecution concerning character witness' knowledge of specific acts of misconduct by defendant must be in good faith.

**12. Witnesses ⇨274(1)**

The prosecutor, in cross-examining character witness concerning witness' knowledge of specific acts of misconduct by defendant, is not permitted to show his good faith by offering evidence of truth of the specific act of misconduct, and lack of good faith must be proved in some way other than by prosecution's failure to substantiate the collateral charge.

**13. Witnesses ⇨274(1)**

Trial court possesses adequate power to restrain an abuse by prosecution of privilege of cross-examining a character witness concerning witness' knowledge of specific acts of misconduct by a defendant for purpose of testing witness' credibility.

**14. Witnesses ⇨274(2)**

Where character witnesses testified as to their knowledge of defendant's general reputation for traits involved in charge of possessing opium, questions on cross-examination as to whether witnesses had heard the defendant had been charged with possession of a still and manufacture of whisky, of visiting and conducting a gambling place, of vagrancy, and of paying a person for engaging in a narcotic transaction, reasonably related to witnesses' knowledge as to defendant's reputation as a law abiding citizen, and questions were proper. St.1941, p. 2820, § 11160.

**15. Witnesses ⇨286(1)**

Where character witnesses who testified as to their knowledge of defendant's general reputation for traits involved in charge of possessing opium were asked on cross-examination whether they had heard of a transaction in which defendant paid another person for engaging in a narcotic transaction, and witnesses answered that they had not heard of the transaction, refusal to permit defendant to elicit further information concerning such collateral matter on redirect examination was proper. St.1941, p. 2820, § 11160.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Gin Shue was convicted of being in the unlawful possession of opium, and he appeals and, in addition, petitions District Court of Appeal to grant a new trial or to remand case to trial court with directions to repass on the motion for new trial.

Petition dismissed, and judgment affirmed.

Nathan Coghlan and Chellis Carpenter, both of San Francisco, for appellant.

Earl Warren, former Atty. Gen., Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Appellant was tried and convicted of being in the unlawful possession of opium in violation of § 11160 of the Health and Safety Code, St. 1941, p. 2820. He has appealed from the judgment of conviction and from the order denying his motion for a new trial. In addition, based on facts alleged to have occurred subsequent to the date the appeal was perfected, he has petitioned this court to grant a new trial, or to remand the case to the trial court with directions to repass on the motion for a new trial.

The evidence produced at the trial supports the implied finding of the jury that appellant, at the time and place charged in the information, was knowingly in the unlawful possession of a quantity of opium and smoking equipment. In the early evening of January 9, 1942, Sergeant Manion and Officer O'Connor of the San Francisco Police Department, regularly assigned to the Chinatown detail, entered the premises of appellant on Sacramento Street, San Francisco, without a warrant. These premises consist of several rooms. Immediately from the street there is a large storeroom; from this room there is a door leading to a fairly large room frequently used by the appellant as a sleeping room; a door, in turn, leads from this room to a small office containing a desk and filing cabinet. The officers were admitted to the premises by appellant. Sergeant Manion remained in the sleeping room and Officer O'Connor and appellant proceeded into the small office. The officer discovered a valise shoved under the desk. The officers testified that when O'Connor reached for the valise appellant grabbed for it and told O'Connor

not to open it. While O'Connor and appellant were struggling over the valise Sergeant Manion instructed O'Connor to give possession to appellant. The appellant, according to the officers, then grabbed the valise and ran towards the door to the bedroom. He was there seized by Sergeant Manion and he and O'Connor took possession of the valise and handcuffed appellant. When the valise was opened it was found to contain 445 grains of a preparation of opium and valuable smoking equipment, the contents being of a value of in excess of \$500.

Appellant admitted that the valise and its contents were found on his premises. He denied struggling with the police over its possession, and testified that immediately after his arrest he told the officers that the opium and smoking equipment were not his property. The police officers admitted that he had so stated but testified that appellant did not then, or at any other time, inform them of the name of the owner of the valise and its contents. At the trial the defense of appellant was that while the valise was found in his possession, he did not own the same and did not know what it contained. In support of this defense he produced several witnesses. Attorney Pomeroy, who has known appellant for many years, and who has acted as his attorney in civil matters, testified that he visited appellant's premises on the afternoon of January 7, 1942, and was talking to appellant in the storeroom when two Chinamen entered; that one was carrying a satchel or valise which he testified was the valise here involved, and the other was carrying a roll of blankets; that they talked with appellant who motioned towards the back room. He described the man who was carrying the valise as being rather elderly, "very slender and a peaked face" and over seventy years of age. Hong Twei Gin, a cousin of appellant, testified that he operated a laundry in San Francisco; that some time prior to January, 1942, he permitted an elderly cousin by name Gin Ti (or Tie or Tai) to live on the laundry premises; that several days before appellant's arrest he accompanied Gin Ti to the premises of appellant; that Gin Ti was then carrying the valise here involved, and he, the witness, was carrying a blanket roll; that he saw Pomeroy at appellant's premises when he entered; that Gin Ti asked appellant if he could leave his valise and bed roll on the premises while he went across the Bay to look for work; that



appellant consented, whereupon Gin Ti walked into the inner office and placed the valise under the desk.

Appellant took the stand in his own defense and testified that the valise belonged to his cousin Gin Ti, and that he, appellant, had no knowledge of what it contained. He described his cousin substantially as did Pomeroy and Hong Twei Gin, and told the same story as did those witnesses. Gin Ti was not produced as a witness at the trial.

[1, 2] On this evidence, on proper instructions of the trial court, there was submitted to the jury the question as to whether appellant had knowledge of the contents of the valise while it was in his possession. The jury found him guilty. There is no doubt that the evidence supports the inference that appellant was unlawfully in possession of the opium, although it would likewise support a contrary finding. Under such circumstances, this court has no power to disturb the judgment on the ground of insufficiency of the evidence. *People v. Turco*, 104 Cal.App. 59, 285 P. 349; *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467; *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Frahm*, 107 Cal.App. 253, 290 P. 678.

On the motion for a new trial appellant offered several affidavits including one signed by Gin Tie, sometimes spelled Ti or Tai. In this affidavit Gin Tie stated that several days prior to January 9, 1942, he had brought a suitcase or valise containing opium and smoking equipment to the premises of appellant and had left the same under the desk in the inner office. He averred that he did not inform appellant of the contents of the valise. His description of this transaction, and his description of the contents of the valise, were substantially similar to those given by appellant and his witnesses at the trial. In addition to the affidavit, appellant's counsel offered to produce Gin Tie as a witness on the hearing of the motion. This was done, and Gin Tie was produced as a witness, a practice well justified by the circumstances. On direct and cross examination Gin Tie testified in detail as to the circumstances under which he left the valise under the desk, and described in detail the valise and its contents. On redirect examination the valise that had been found under the desk was exhibited to the witness, and he positively denied that it was his. The trial

court thereupon denied the motion for a new trial.

On the same day that appellant's closing brief was filed on this appeal, appellant also filed a petition to remand the case to the trial court for a new trial or to remand the case to the trial court to pass again on the motion for a new trial. It is appellant's contention that since the appeal was perfected new evidence has been discovered which warrants the granting of this extraordinary relief. The allegedly newly discovered evidence consists of a new affidavit by Gin Tie. This affidavit states that the affiant, in fact, placed the valise containing the opium and smoking equipment under the desk in question as described by the witnesses, and frankly and directly states that his testimony given on the motion for a new trial that the valise exhibited to him was not his, was false; that in fact the valise belongs to him, and that it is the one deposited by him under the desk on appellant's premises.

[3] It is apparent that this court has no power to grant the petition. There is no contention that the prosecuting officials conspired or participated in producing or knowingly or otherwise produced perjured testimony. The allegedly perjured testimony was produced by appellant. In the absence of an allegation of participation by the court or the prosecuting officials in the production of the allegedly perjured testimony there is no power in this court on this appeal (or on habeas corpus) to go beyond the record on appeal. By the Constitution (Art. VI, § 4b) the jurisdiction of this court in such a case is limited to considering the appeal or to issuing a writ of habeas corpus. A motion or petition such as is here involved may not be substituted for an appeal. So far as our appellate jurisdiction is concerned we are limited to the record on appeal. We have no power to consider the petition.

[4] On the appeal it is urged that the information does not conform to the requirements of §§ 950, 951 and 952 of the Penal Code. Those sections require that the information charge the offense in ordinary and concise language, understandable to a person of common understanding; that it contain, substantially, a statement that the accused has committed a public offense; that it may be in ordinary and concise language with no necessity for technical averments; that it may be in

any words sufficient to give the accused notice of the offense with which he is accused.

The information in the present case is worded as follows: "Gin Shue, is accused by the District Attorney of the City and County of San Francisco, State of California, by this information, of the crime of Felony, to-wit: Violating Section 11160 of the Health and Safety Code, committed as follows: The said Gin Shue, on or about the 9th day of January, A. D. nineteen hundred and forty-two, at the City and County of San Francisco, State of California, did then and there wilfully, unlawfully and feloniously have in his possession a preparation of opium; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California."

Section 11160 of the Health and Safety Code as amended in 1941 provides that it shall be unlawful to possess a narcotic except upon the written prescription of a licensed physician, dentist, chiropodist or veterinarian. Section 11001, St.1939, p. 755, includes opium within the definition of "narcotics," and § 11002 provides that the term shall also include a salt, derivative or compound of a narcotic. In *People v. Bill*, 140 Cal.App. 389, page 391, 35 P.2d 645, page 646, in connection with a contention similar to the one here made it was stated: "The information sufficiently charges the defendant with the offense of having possession of cocaine contrary to the provisions of the statute above referred to. The information refers to the act by quoting the title thereof and then alleges that the defendant, on the 26th day of January, 1934, in the county of Sacramento, Cal., 'did then and there wilfully and unlawfully and feloniously have in his possession a preparation of cocaine; contrary to the form, force and effect of the statute. \* \* \*' The information is couched in the language of the statute and conforms to the provisions of sections 950-952 of the Penal Code. It sufficiently informs the defendant that he was charged with the unlawful possession of cocaine." See, also, *People v. Smith*, 54 Cal.App.2d 587, 129 P.2d 732. The information here challenged was sufficient.

[5] Appellant next objects to certain rulings of the trial court made on the direct and cross examination of certain character witnesses presented by him. During the trial, and before he took the stand in his

own defense, the appellant presented ten persons as character witnesses. All were substantial and responsible men in the community. The record shows that on the direct examination of these witnesses considerable confusion existed in the minds of the court and counsel as to the proper extent of the examination. The court finally ruled that the witnesses could be asked as to their knowledge of the general reputation of the accused for the traits involved in the charge of possession of opium. The following are examples of the type of questions asked these witnesses. The witness Pomeroy, an attorney at law, was asked, "Do you know the reputation of the defendant in this case as one who would or wouldn't have in his possession a contraband of this kind?" R.T. 70. During the examination of the witness Burns, a notary public, after he had testified as to his acquaintanceship with the accused, the following occurred: "Q. [By appellant's counsel] Mr. Burns, the defendant here is charged with having in his possession a preparation of opium. Just how to place the trait here involved, we are at a bit of a loss. Do you know what his general reputation is in this community for dealing—

"The Court: For the traits involved.

"Mr. Coghlan: Q. For the traits involved. You can derive what they are from the charge. The traits which may be involved in a charge of this character, to-wit, possession of narcotics \* \* \*

"Mr. Coghlan: Q. Do you know what his general reputation is? A. Good; his general reputation is good." R.T. 88 and 89. The witness Stidger, an attorney at law, was asked: "Q. Do you know what his general reputation is in this community for the traits that are involved here? He is here charged with having possession of opium, a preparation of opium." R.T. 94. The witness Charles T. Hughes, an insurance broker, after testifying as to his familiarity with the accused, was asked: "You know then what the reputation of this defendant is for the traits that are here involved. You understand he is charged with having possession of a preparation of opium." R.T. 97. The witness Lee Song, a restaurant proprietor, was first informed that appellant was accused of having possession of a preparation of opium, and was then asked: "Do you know in relation to having opium in his possession—do you know whether he is a good man or a man—whether his general reputation is good or

bad?" R.T. 104. The witness Hickey, assistant superintendent of railway mail with the Post Office Department was asked: "I will tell you what this charge is. They have charged him with the possession of a preparation of opium. I am going to ask you if you know what his reputation, general reputation in this community is, for the trait here involved? I take it that the charge—from the charge itself you can infer what the traits are. Do you know what his reputation is?" R. T. 109. And again, "Do you feel you know what his general reputation is for these traits?" R.T. 110. Arthur J. Fritz, a custom house broker, was asked if he knew the appellant's reputation for "the traits that are involved here" (R.T. 140), to which he answered, "No." He was then asked if he knew the appellant's "general reputation for truth, honesty and integrity?" R.T. 141. The witness B. K. Chan, manager of the Mandarin Theatre was asked: "Do you know what his general reputation for truth, honesty and integrity, and his reputation for the traits that might be involved in a charge of possessing opiates—what that reputation might be, or what it is in Chinatown, in the community?" R.T. 144. Some confusion arose in the questioning of the witness Lee Sing Hing, a merchant and member of the board of directors of the Six Companies and of the Chinese Chamber of Commerce. The Court finally suggested: "Why don't you ask him the general question, if he knows the general reputation of this man for the traits involved, that is, the possession of opium?" He was then asked: "Do you know what his general reputation is in this community for the traits that are here involved? \* \* \* He is charged with having in his possession a preparation of opium." R.T. 196. These questions fairly typify those asked of the witnesses on this subject. All of the witnesses (except the witness Fritz) testified that they did know the appellant's reputation for the traits involved, and that it was "good" or "excellent." On cross examination some of these witnesses were asked, in varying forms, whether they had heard that the appellant had been arrested or charged with the crimes of possession of a still and manufacture of whiskey, of visiting a gambling place, of conducting a gambling place, and of vagrancy. Several of them were also asked whether they had heard that the appellant had paid a certain Tom Sing Sue a sum of money for the purpose of engag-

ing in a narcotic transaction. Objections to these questions were overruled, and the witnesses, with one or two minor exceptions, answered in the negative. On redirect examination several of the witnesses were asked if they had heard of a different explanation of the Tom Sing Sue transaction than had been referred to by the prosecutor. Objections were sustained. Appellant now urges that it was prejudicial error to permit the prosecutor to ask the character witnesses whether they had heard of these specific acts of misconduct of the accused not connected with the specific charge for which he was on trial. It is appellant's position that on direct examination he was specifically limited to interrogating the witnesses as to their knowledge of the reputation of the accused for possessing opium. We do not so interpret the questions. The witnesses were asked as to their knowledge of the reputation of the accused in relation to the traits involved in the offense charged. Included within that question, as would be true with any criminal charge, is necessarily the trait of being a law abiding citizen. The questions were awkwardly phrased it is true, and it would have been better practice to have informed the witnesses more specifically of the traits involved, but it is our opinion that the witnesses, on direct examination, were not unduly limited or misled. The record indicates that they understood that appellant's reputation as a law abiding citizen was the subject of the inquiry.

[6-10] It is well settled, of course, that the reputation of the defendant as to his character is within the scope of legitimate inquiry by the defendant. This means that the defendant may produce witnesses who may be questioned as to their knowledge of the reputation of the defendant as a law abiding citizen. When a witness has so testified, the credibility of that character witness is placed in issue. One way to test the accuracy and weight of the statement of the witness as to the existence of the good reputation of the accused is for the prosecution, in good faith, to ask the witness whether he has heard of certain rumors, occurrences or charges as to specific acts of misconduct of the accused relating in general to the traits involved in the charge, including the reputation of the accused as a law abiding citizen. The prosecution is confined to the answer given by the witness, and can inquire no further into the matter. In other words, the de-



fendant's general misconduct cannot be inquired into by either the prosecution or defense as a fact—the question is as to the good reputation of the accused, and as to the credibility of the witness who testifies that that reputation is good. *Wigmore on Evidence*, 3rd Ed., §§ 197, 988; *People v. McKenna*, 11 Cal.2d 327, 79 P.2d 1065; *People v. Stevens*, 5 Cal.2d 92, 53 P.2d 133; *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467; *People v. Hernandez*, 47 Cal.App.2d 132, 117 P.2d 394; *People v. Sambrano*, 33 Cal.App.2d 200, 91 P.2d 221. If the trial judge is so requested, he should instruct the jury that the prosecution's questions do not prove the existence of the fact of the misconduct, and that the existence of such fact is not an issue in the case—it merely has relevancy on the issue as to the credibility of the character witness if he admits knowledge of the misconduct. No such instruction was asked here.

[11-13] The cross examination by the prosecution concerning the knowledge of the witness of specific acts of misconduct must be in good faith. *Wigmore on Evidence*, 3rd Ed., § 988. The prosecutor is not permitted to show his good faith by offering evidence of the truth of the specific acts of misconduct which are the subject of the question, because that would be to place in issue the truth of that charge, a purely collateral matter. The lack of good faith must be proved in some way other than by the failure of the prosecution to substantiate the collateral charge. *People v. Sambrano*, 33 Cal.App.2d 200, 91 P.2d 221; *People v. Hightower*, 65 Cal.App. 331, 224 P. 710; *People v. Burke*, 18 Cal. App. 72, 122 P. 435; *People v. Gordan*, 103 Cal. 568, 37 P. 534; *People v. Burns*, 121 Cal. 529, 53 P. 1096. The trial courts possess adequate powers to restrain an abuse of this privilege.

[14] It follows that since the questions on cross examination reasonably related to the knowledge of the witness as to the reputation of the character of the accused as a law abiding citizen they were proper.

[15] The above analysis also applies to the questions sought to be asked on redirect concerning the transaction with Tom Sing Sue. When the witnesses answered on cross examination that they had not heard of the transaction as described in the questions of the prosecutor that ended that inquiry. The question as to whether such charge was true or false was not in issue.

Neither the prosecution nor the defense can be permitted to elicit evidence as to the truth or falsity of such collateral matters. It would have been improper to have permitted appellant to elicit information relating to the nature of the transaction in question.

The petition is dismissed; the judgment and order appealed from are affirmed.

KNIGHT and WARD, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



58 Cal.App.2d 805

**STRONG v. MACK et al.**

Clv. 3088.

District Court of Appeal, Fourth District,  
California.

May 25, 1943.

Hearing Denied July 22, 1943.

#### 1. Appeal and error ⇨773(2)

Appeal must be dismissed for failure to file opening brief within time required by rules of court, unless appellant shows sufficient excuse for delay. Rules of the Supreme Court and District Courts of Appeal, rule 1, § 4; rule 5, § 1.

#### 2. Appeal and error ⇨772

Motions to relieve from default in perfecting appeal are usually considered as addressed to sound discretion of the court.

#### 3. Appeal and error ⇨772

Motions to be relieved from default in perfecting appeal should be given careful and perhaps liberal attention, especially in Fourth Appellate District which has peculiar geographical situation and requirement that court hold sessions in three cities. St.1929, p. 1202.

#### 4. Evidence ⇨5(2)

It is common knowledge, of which court can take judicial notice, that many San Diego attorneys have been called into military and departmental services of the country.

#### 5. Appeal and error ⇨771

Where appellants delayed in filing opening brief because their attorney was

unexpectedly appointed city attorney, which cast new burdens on him and non-delegable duties in connection with war work, and appellants were unable to employ another attorney, appellants were granted relief from default and motion to dismiss appeal was denied. St.1929, p. 1202.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by F. D. Strong against Joseph Mack and others, wherein C. J. Novotny and another filed cross-complaints. From an adverse judgment, cross-complainants appeal. On respondent's motion to dismiss appeal and appellants' motion to be relieved from default in filing brief.

Respondent's motion denied and appellants' motion granted.

C. J. Novotny, of San Diego, for appellants.

W. E. Starke, of San Diego, for respondent.

MARKS, Justice.

Respondent has moved to dismiss this appeal because appellants' opening brief was not filed within the time specified in a stipulation. Appellants have moved to be relieved from default because their delay and neglect were excusable. Both motions are submitted for our decision.

The clerk's and Reporter's transcripts on appeal were filed in the Supreme Court on October 13, 1942. The filing fee was paid. The cause was transferred here and the record filed on December 23, 1942. By stipulation appellants were given until April 1, 1943, to file their opening brief. The brief was not filed and the notice of motion to dismiss the appeal was filed on April 9, 1943, to be heard on May 11th.

Respondent relies on section 4, Rule 1; and section 1, Rule V, Rules of the Supreme Court and District Courts of Appeal, and the case of Clinton v. Shaw, Cal.App., 131 P.2d 58. A rehearing was granted in that case. The final opinion appears in 57 Cal.App.2d 630, 135 P.2d 172. Since that decision the Supreme Court dismissed the appeal of the defendant in Murphy v. Krumm, 21 Cal.2d 846, 136 P.2d 8, for the reason that appellant Krumm failed to pay his filing fee and to file his opening brief for more than six months after the record was filed.

[1] This court has dismissed appeals where the appellant failed to pay the filing fee for over a year after it was due (Deist v. First National Bank of Orange, 28 Cal.App.2d 379, 82 P.2d 630), but has consistently declined to dismiss them for delays in filing the opening brief, especially where no appreciable delay in hearing the appeal had been caused. Since the decision in Murphy v. Krumm, supra, we must abandon our former policy on motions to dismiss as the Supreme Court has held that the rules of court have the effect of law and must be followed. Therefore, unless appellant has shown sufficient excuse for delay, his appeal must be dismissed.

[2] There have been no hard and fast rules laid down to govern the action of courts on motions to relieve from default. Each case must be decided on its own merits according to the facts developed at the hearing. Such motions are usually considered as being addressed to the sound discretion of the court before which the motion is made. Appellant has filed an affidavit in support of his motion, but there are other circumstances which should be considered in order that substantial justice may be done.

This court has consistently refused to dismiss appeals where the appellant's opening brief was filed after the notice of motion was given and before the motion to dismiss was made in open court or, where the appellant presented what appeared to be a reasonable excuse for the delay and where no appreciable delay had been occasioned in the hearing of the case. Thus the court itself must share some of the responsibility for some of the delay in filing some briefs because of its mistaken interpretation of the rules in question, as directory instead of mandatory. This mistaken interpretation has come to be regarded as a rule of practice here as well as in some other district courts of appeal, and its abandonment without warning will cause innocent clients to be deprived of their day in court because their counsel may have relied upon it. The Supreme Court took a liberal view of a change in procedure made by repeal of a statute and the adoption of a rule of court which was not followed by an appellant. That court refused to dismiss his appeal, holding that the cause should be heard on its merits. Thus we are not without eminent authority for liberality in ruling on the motion to be

relieved from default. *People v. Bryant*, 207 Cal. 450, 278 P. 1025.

[3] One of the reasons for liberality in the ruling of this court is because of the geographical situation of the district and the requirement of law that the court hold sessions in three cities. *Stats.*1929, p. 1202. This situation is peculiar to this district and does not exist in any other appellate district. To some extent it may be responsible for the custom of procedure which has grown up here.

For the convenience of the court, counsel, and litigants, we have adopted the policy of hearing, in Fresno, cases originating in the four northern counties of the district; in San Diego, those originating in the two southern counties, and, in San Bernardino, those originating in the four central counties. This results in a fairly equal distribution of the work and saves the litigants the expense of sending counsel the considerable distance that separates the three cities, especially San Diego and Fresno. Of course, if any good reason is shown, we can hear a case in any of the three cities regardless of its county of origin.

This distribution of the work results in the accumulation of cases that have been filed during the eight months preceding our return to any one of the three cities, and, when added to the relatively few cases which were not calendared before our leaving that city, usually due to their having been filed in the latter part of the four-month session, furnish the cases to be decided during that session.

This policy of the division of the work is well known to the members of the Bar in the district and has resulted in some of them delaying the filing of briefs until shortly before the opening of a session in the portion of the district where the cases are pending. This has not materially affected the time of hearing these cases. During the time the court is in the other localities, some attorneys have failed to get stipulations or orders extending the time to file their briefs. While this practice is not to be commended, that it has not been regarded as a serious omission is attested by the relatively few motions to dismiss appeals made during the past few years.

Absolute strictness in applying the rules in question might result in grave injustice and would deprive a litigant acting in good faith of his day in court. In California attorneys are licensed to practice law. This

in itself is a representation to the public that the licensee is possessed of some knowledge of the law and procedure and may be expected to apply that knowledge in representing a client, who ought to be entitled to rely upon this representation when he engages an attorney. If the attorney fails in his duty, and fails to follow established procedure in the matter of filing a brief on time, to deprive the client of his day in court for no fault of his own seems to be a result to be avoided if possible. It is a severe penalty to be inflicted on a client to deprive him of his day in court for no fault other than his reliance on the implied representation of competency made by the licensing of the attorney. For these reasons we ought to give careful and perhaps liberal attention to a motion to be relieved from default.

If the motion to be relieved from the default be granted, and the motion to dismiss be denied, no great delay will be occasioned if respondent is prompt in filing his brief, and, if a statement in an uncontradicted affidavit filed by counsel for appellants be taken as true. That statement is as follows: "That affiant has placed his opening brief in the hands of the printer last week and same would have been completed and it was expected that the printing thereof would be completed by this time but the printer has informed affiant that such completion has been impossible on account of the difficulty in getting help on account of war time conditions, but completion within a few days has been promised."

Assuming the foregoing statement to be true, there remains no good reason why the cause may not be submitted before the court leaves San Diego, if respondent will be diligent in filing the reply brief.

[4] The affidavit filed by appellants, while not too definite and satisfactory, gives three principal reasons as excuses for the delay in filing the brief: The unexpected appointment of their attorney as city attorney of San Diego which cast many new burdens on him, duties in connection with war work which he could not delegate to another, and inability to employ another attorney to do the work for him because so many San Diego attorneys have been called into the military and departmental services of the country. This last is a matter of such common knowledge that we may take judicial notice of it. *Varcoe v. Lee*, 180 Cal. 338, 181 P. 223. San Diego attorneys



seem to be in a unique position as those remaining in practice here all report an unusual volume of business. We are also aware that recently the printing of numerous briefs has been delayed because of a shortage of labor in printing plants.

[5] Motions to be relieved from default are usually addressed to the sound discretion of the court. There should be no abuse of that discretion if the motion to be relieved from default be granted with sufficient restrictions to guard against undue delay in hearing the appeal on its merits. There should be some liberality in ruling on motions of this kind until the Bar has time to become informed of the fact that we must change our former liberal policy in ruling on motions to dismiss.

The motion to be relieved from default is granted and appellants are given fifteen days from the date of filing this opinion in which to file the opening brief.

The motion to dismiss the appeal is denied without prejudice to renewing the motion if the brief be not filed.

BARNARD, P. J., and GRIFFIN, J., concur.



59 Cal.App.2d 1

**In re WEBSTER'S ESTATE.**

**McCRILLIS et al. v. YOUNG WOMEN'S  
CHRISTIAN ASS'N OF SAN DIEGO  
et al.  
Civ. 2884.**

District Court of Appeal, Fourth District,  
California.  
May 28, 1943.

**1. Wills ⇨392**

Where judgment in will contest was affirmed on appeal in so far as it held invalid a residuary clause and codicil, and was reversed for retrial only on issues of validity of revocation clause and clause naming executor, one not an heir, who was a beneficiary only under invalid codicil, was no longer an "interested party" and could not appear at the second trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Party".

**2. Wills ⇨229**

A contestant must be an interested party in order to appear in court and contest a will.

**3. Wills ⇨307**

When it develops that contestant is no longer an interested party, will contest should be dismissed.

**4. Wills ⇨384**

Failure to dismiss will contest on ground that contestant was not an interested party was not prejudicial to one who was also not an interested party.

**5. Wills ⇨229**

Where earlier will left realty and half of all securities to association, and contained no general residuary clause, association was an "interested party" and a proper party in will contest involving validity of revocation clause in subsequent will.

**6. Wills ⇨384**

In will contest, alleged error in submitting to jury the validity of clause naming executor, though named executor had died, was not reversible in absence of showing of prejudice to any party. Const. art. 6, § 4½.

**7. Wills ⇨166(1)**

Evidence supported findings that clause revoking prior wills and clause naming executor were obtained by undue influence.

**8. Wills ⇨163(2)**

The inference of "undue influence" arises where a person occupies a confidential relationship to testatrix and unduly profits from provisions of will.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

**9. Wills ⇨166(1)**

Proof to establish "undue influence" must show pressure which overpowered the mind and bore down the volition of testator at the very time the will was made.

**10. Wills ⇨158**

The reasons for and effects of undue influence must be measured as of time of execution of testamentary instrument, and the result cannot be influenced by later occurrences.

**11. Wills ⇨392**

The inference of undue influence by legatee named in residuary clause, on ground that such legatee occupied confiden-

tial relationship and unduly profited from will, could be drawn in determining validity of revocation clause though residuary clause had been held invalid on former appeal so that legatee could not profit therefrom.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Ella M. Webster, deceased, wherein Dora W. McCrillis and another appealed from a judgment admitting to probate a will and portions of a later will as a codicil, opposed by the Young Women's Christian Association of San Diego, California, and another.

Affirmed.

See, also, 43 Cal.App.2d 6, 110 P.2d 81, 111 P.2d 355.

Arthur F. H. Wright and Monroe & McInnis, all of San Diego, for appellants.

Carl Alex Johnson, Gray, Cary, Ames & Driscoll, and John M. Cranston, all of San Diego, for respondents.

#### MARKS, Justice.

This is an appeal from a judgment admitting to probate the will of Ella M. Webster, deceased, which was dated February 29, 1932, and portions of a will dated March 28, 1934, as a codicil to the earlier will.

The case has been here before. In re Estate of Webster, 43 Cal.App.2d 6, 110 P.2d 81, 111 P.2d 355. The main facts of the case and the undue influence exerted on Mrs. Webster by James L. Crane and Annette M. Crane in connection with certain provisions of the will of March 28, 1934, are there detailed and need not be repeated here. The judgment then before the court for review was affirmed except in two particulars. A portion of the judgment admitting to probate the will of February 29, 1932, and appointing an executor was reversed.

The cause was sent back for partial retrial with the following instructions: " \* \* \* with directions to the trial court to present to the jury the sole questions: (1) Was the provision of the will dated March 28, 1934, 'revoking any and all other wills and codicils heretofore made and/or executed by me' made under undue influence? (2) Was the provision of the will dated March 28, 1934, nominating

James L. Crane executor made under undue influence? If these questions are answered in the affirmative the court may then be authorized to admit the first will to probate, appoint the executors named and deny probate to those additional portions of the will of March 28, 1934, found to be made under undue influence. If answered in the negative, the court should then make an appropriate order and judgment in accordance with the combined findings of the jury."

The reversal was made necessary because the trial court had failed to submit to the jury the two questions propounded in the foregoing quotation.

After the reversal of the judgment, and before the second trial, James L. Crane, named executor in the second will, died.

Dora W. McCrillis was a niece of Ella M. Webster. Before the second trial she was permitted to file her answer to the contest of the Young Women's Christian Association and thus was made a party appearing at the second trial.

The second trial was had before a jury to which was submitted the two questions we have quoted. They were both answered in the affirmative. The will of February 29, 1932, was admitted to probate with the portions of the will of March 28, 1934, which had been found to have been executed free from undue influence, and Evan H. Curtiss was appointed executor.

Appellants urge three grounds for reversal of the judgment now before us for review. They are: (1) That the trial court erred in refusing to permit Mrs. Crane to appear and participate in the second trial as a party; (2) that the trial court erred in submitting to the jury the question of whether or not the paragraph of the will of March 28, 1934, appointing James L. Crane executor, was made under undue influence; (3) that there is not sufficient evidence to support the finding of the jury that the revocatory clause in the will of March 28, 1934, was executed under undue influence and that consequently the portion of the judgment admitting the will of February 29, 1932, to probate and appointing one of the executors named in it was error.

[1] Annette M. Crane and James L. Crane were husband and wife. In the will of March 28, 1934, Mrs. Webster left the residue of the estate to James L. Crane. A codicil to this will dated January 2,

1935, changed this bequest and left the residue to James L. Crane and Annette M. Crane. At the first trial the jury found that the residuary clause in the will and the codicil were both made under undue influence and the judgment denied their probate. This portion of the judgment was affirmed on appeal and has long since become final. Mrs. Crane was not an heir at law of Mrs. Webster and her only hope of participating in the estate was under the codicil. When that document was adjudged void she ceased to be a party interested in the estate as she could receive no part of it either as an heir at law or under any testamentary disposition.

[2, 3] It is thoroughly settled in California that a contestant must be an interested party in order to appear in court and contest a will. *In re Estate of Land*, 166 Cal. 538, 137 P. 246; *Lobb v. Brown*, 208 Cal. 476, 281 P. 1010; *In re Estate of Moore*, 65 Cal.App. 29, 223 P. 73. It is also the rule that where, during a contest, it develops that the contestant is no longer an interested party the contest should be dismissed. *In re Garcelon's Estate*, 104 Cal. 570, 38 P. 414, 32 L.R.A. 595, 43 Am.St.Rep. 134.

Under these authorities there was no error in refusing to permit Mrs. Crane to appear as a party at the second trial. The judgment refusing probate to the codicil of January 2, 1935, had become final. Thereafter she ceased to be an interested party and had no further interest in the proceedings.

[4] It is urged on behalf of appellants that the contest of the Young Women's Christian Association should have been dismissed because at this stage of the proceedings it had developed that it could not take under either will and that it was not a party in interest that could maintain a contest of the will of March 28, 1934. *In re Garcelon's Estate*, supra. This argument is more ingenious than logical, especially as far as Mrs. Crane is concerned. As she cannot take any part of the estate under any circumstances she cannot be injured. Further, it is difficult to see how Dora W. McCrillis could have been prejudiced by the ruling as she was permitted to fully present her case and Mrs. Crane was permitted to testify as a witness.

Further, it is not made to appear that this association may not take some part of the personal property belonging to the de-

ceased. The will of February 29, 1932, which has been admitted to probate left certain described real property, and one-half of all stocks, bonds and other investment securities belonging to deceased to this association. This will contained no general residuary clause.

[5] The will of March 28, 1934, contained a general residuary clause in favor of James L. Crane. It has been adjudged that this clause was executed under undue influence and is inoperative so there is no general residuary clause in the portions of that will admitted to probate as a codicil to the earlier will. This later will did not name the Young Women's Christian Association as a beneficiary and left the real property formerly bequeathed to that association to another beneficiary. It left \$2,000 to Mrs. Hannah P. Davidson, \$5 to each of any heirs at law who might prove relationship, \$5 to any of the legatees named in it who might institute a contest and created a trust in any bequest made in that will which might lapse. We are pointed to no bequest that might come under this last clause. In the former opinion in this matter (43 Cal. App.2d 6, 110 P.2d 81, 87, 111 P.2d 355) it was stated that the personal property of the deceased exceeded \$20,000 in value, so specific bequests of personal property made in the 1934 will would not exhaust the personal property, part of which would seem to consist of stocks, bonds and other such securities, so, instead of indicating that the Young Women's Christian Association cannot receive any portion of the estate under the documents admitted to probate, the contrary seems probable. Therefore, as far as the record now shows, the Young Women's Christian Association is a party interested in the estate and a proper contestant.

[6] James L. Crane died after the decision of the former appeal and before the second trial. It is urged that it was error to submit to the jury the question, "Was the provision of the will dated March 28, 1934, nominating James L. Crane executor made under undue influence?" as that question had become moot because of his death. If we assume the soundness of this argument we cannot see how any prejudice to any party could have resulted from the procedure followed. We cannot reverse a judgment because of harmless error. (Sec. 4½, Art. VI, Const.)



It is now argued that there was no evidence presented showing that undue influence was used upon Mrs. Webster to induce her to execute the revocatory clause of the will of March 28, 1934.

This same general argument was made to this court on the former appeal. In commenting on the sufficiency of the evidence then before the court as it affected the revocatory clause, this court, speaking through Mr. Justice Griffin, said: "It is with reluctance that we have reached the conclusion that we are required by law to reverse portions of the judgment, because they are so obviously correct in fact. They are strongly supported by the presumptions as well as the testimony of disinterested witnesses. The residuary clause of the 1934 will making Crane the residuary beneficiary is so closely related to the clause revoking the 1932 will and the clause appointing Crane executor of the 1934 will that it does not seem possible that any jury would find the first clause void because of undue influence and the other two clauses valid because made voluntarily and free from undue influence or that a trial judge would let any such inconsistent verdict stand should one be returned. However, we have been unable to discover any lawful ground upon which the judgment can be affirmed as it now stands."

[7] It is now urged that the foregoing was dicta at the time it was written and is not now binding on this appeal. While this may be true we now adopt this portion of the former opinion as the settled conclusion of this court after a review of the record now before us. The evidence of several of the witnesses who testified at the first trial was read at length to the jury at the second trial. The evidence of the witnesses testifying at the second trial did not differ materially from that given at the first trial on the question of undue influence. It is amply sufficient to support the finding that both Mr. and Mrs. Crane exercised undue influence on Mrs. Webster in getting her to incorporate into the will of March 28, 1934, and the codicil of January 2, 1935, all the provisions under which they hoped to benefit.

[8] Mr. Crane occupied the confidential relationship of guardian of Mrs. Webster at the time of the execution of the will of March 28, 1934, and the codicil of January 2, 1935. The inference of undue influence arises where a person occupies a

confidential relationship to the testatrix and unduly profits from the provisions of the will. In *re Estate of Presho*, 196 Cal. 639, 238 P. 944; In *re Estate of Shay's Estate*, 196 Cal. 355, 237 P. 1079. It is argued that this inference cannot now be invoked in connection with the revocatory clause of the will because under the portion of the former judgment, which was affirmed on the first appeal, all clauses of the will of March 28, 1934, under which either Mr. or Mrs. Crane could take, as well as the codicil of January 2, 1935, which purported to give Mrs. Crane one-half of the residue of the estate, were held inoperative because of undue influence; that because the revocatory clause was the only matter properly at issue in the second trial there could be no inference of undue influence drawn from the confidential relationship because neither Mr. or Mrs. Crane could unduly profit from it or under it.

[9-11] It is established that, "Proof to establish undue influence must be had of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. [In *re*] *Estate of Carithers*, 156 Cal. 422, 105 P. 127." In *re Estate of Velladao*, 31 Cal. App.2d 355, 88 P.2d 187, 190. So the reasons for, and the effects of the undue influence must be measured as of the time of the execution of the testamentary instrument and the result cannot be influenced by what occurred at some later time. The same influence that overpowered the mind of Mrs. Webster, and bore down her volition, resulted in the insertion of the residuary clause in favor of Crane and the revocatory clause in the will. The residuary clause left Crane all the estate not specifically bequeathed. This consisted largely of personal property. The revocatory clause revoked the prior will which had specifically bequeathed part of this personal property to others, so, at that time, the effect of the undue influence was to unduly enrich Crane by revoking a will containing specific bequests, so that the residue he would take under the residuary clause would be materially increased. Thus the proof brings the case well within the rule announced in *Re Estate of Presho*, *supra*, and *Re Estate of Shay's Estate*, *supra*, to the effect that the inference of undue influence arises where one occupying a confidential relationship to the testatrix is unduly enriched.

This inference drawn by the jury furnishes evidentiary support to the judgment. The judgment is affirmed.

BARNARD, P. J., concur.

GRIFFIN, J., deeming himself disqualified, does not participate herein.

for which contestant and contestee ran in disputed election only remaining controversy was matter of costs, confession by contestee that contestant was entitled to a judgment annulling election of contestee was determinative of cause in favor of contestant's administratrix. St.1939, pp. 266, 267, §§ 8556, 8572.



58 Cal.App.2d 861

**CUPPLES v. CASTRO.**

Civ. 12205.

District Court of Appeal, First District,  
Division 2, California.

May 28, 1943.

**1. Elections** Ⓒ305

Estate of deceased election contestant had an interest in an appeal under Election Code provision for costs in election contests sufficient to preclude dismissal thereof as moot upon death of contestant. St.1939, p. 267, § 8572.

**2. Elections** Ⓒ305

Where election contestant died after contestee had appealed, contestee could not pursue appeal until a representative of contestant was substituted.

**3. Elections** Ⓒ305(6)

On election contestee's appeal where it appeared that contestant had died and that term of office for which contestant and contestee ran in disputed election had expired, only controversy for decision was that of costs. St.1939, p. 267, § 8572.

**4. Elections** Ⓒ305(6)

In election contest upon expiration of term for which disputed election was held, question of whether contestant, as a candidate, was or was not elected at a valid election became "moot".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

**5. Elections** Ⓒ305(9)

Where by reason of death of election contestant and expiration of term of office

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Election contest by Samuel E. Cupples against Clarence A. Castro, wherein pending appeal contestant died and Eunice I. Cupples, as administratrix of the estate of Samuel E. Cupples, deceased, was substituted as contestant. Judgment for contestant, and contestee appeals.

Affirmed.

See, also, 130 P.2d 747, 55 Cal.App.2d 489.

David M. Burnett, John M. Burnett, and Charles Wilcox, all of San Jose, for appellant.

Rea, Free, Jacka & Frasse, of San Jose, for respondent.

SPENCE, Justice.

This is an appeal taken upon the judgment roll alone from a judgment in favor of the contestant in an election contest.

The cause was previously before this court for hearing at which time it was ordered off calendar until a representative of contestant Samuel E. Cupples might be substituted as respondent. Cupples v. Castro, 55 Cal.App.2d 489, 130 P.2d 747. Since that time Eunice I. Cupples, as the administratrix of the estate of Samuel E. Cupples, deceased, has been duly substituted; said administratrix has filed a brief; and the cause has been argued and submitted.

[1-3] The trial court entered its judgment in favor of the contestant on July 18, 1941. This appeal was taken by the contestee on July 21, 1941. Before the filing on May 15, 1942, of the transcript on appeal, the contestant died on February 12, 1942. On the previous hearing, it was held upon the authority of Snibley v. Palmtag, 127 Cal. 31, 59 P. 200, that the estate of the deceased had an interest in the appeal because of the provisions for costs in election contests (Elections Code, § 8572, St.1939, p. 267) and that while the

contestee had a right to pursue his appeal, he could not do so until a representative of the contestant had been substituted. After the substitution had been made and at the oral argument on May 12, 1942, it was, of course, conceded that the contestant had died during the pendency of the appeal and it was further conceded that the two year term, for which the contestant and contestee ran in the disputed election of April 7, 1941, had expired. In view of these conceded facts, the only remaining controversy between the contestee and the representative of the contestant is the controversy over costs.

A determination of this controversy over costs does not require the discussion of the numerous questions argued in the briefs of the parties. Section 8511 of the Elections Code, St.1939, p. 263, provides that any elector may contest an election upon any of the grounds specified therein. The contest herein was brought upon the grounds specified in subdivisions (d) and (e) of said section to-wit: errors of precinct boards in determining the qualifications of certain electors and the legality of certain votes and errors in the counting, tallying and canvassing the returns sufficient to change the result of the election. The contestant sought judgment annulling and setting aside the election of the contestee (Elections Code, § 8556) and declaring that the contestant had been duly elected mayor of the City of Santa Clara. Elections Code, § 8557. The contestee filed an answer in which he alleged among other things, "That each and every vote cast, counted and tallied at said election for this contestee was correctly counted and was a valid and legal vote by a duly qualified elector of the City of Santa Clara entitled to vote at said election; that each of said ballots cast for this contestee at said election were ballots that were properly marked and cast and valid and regular in all respects." The contestee prayed that judgment be entered declaring that the contestee had been duly elected mayor of the City of Santa Clara. It was not suggested in the pleadings of either party that there had been any errors or irregularities other than alleged errors above indicated. On the contrary, the pleadings of both parties were drawn upon the theory that

the election was generally valid except for the alleged errors above indicated. The trial court found in favor of the contestant and found specifically that "Samuel E. Cupples, contestant herein, received 907 legal votes for the office of Mayor of said City of Santa Clara at said election; Clarence A. Castro, contestee herein, received 898 legal votes, and no more for said office, \* \* \*"; and as conclusions of law, the trial court concluded that the election of the contestee should be annulled and set aside and that the contestant should be declared elected.

[4,5] On this appeal upon the judgment roll alone, the contestee of course makes no contention that the evidence was insufficient to sustain the findings with respect to the number of votes received by the respective candidates. His sole contention is that the election was invalid generally because of certain other alleged irregularities, not specified in the pleadings; "that all ballots cast in this case are illegal"; and that "the election should be held void as to Mayor and that neither party was elected Mayor of Santa Clara". He states, "In this case, Mr. Cupples may have proved that Mr. Castro was not elected Mayor but Mr. Cupples has failed to prove that he was elected Mayor. It is our contention that the judgment of the court should be one annulling the election of the Mayor and ordering a new election \* \* \*". The concession of the contestee that the contestant, as an elector, was entitled to a judgment annulling the election of the contestee (Elections Code, § 8556) is determinative of the only remaining controversy with respect to costs. Elections Code, § 8572. The question of whether the contestant, as a candidate, was or was not elected mayor at a valid election has clearly become a moot question because of the expiration of the term for which the election was held. No useful purpose could be served by discussing the alleged irregularities now suggested by the contestee or by discussing the right of the contestee to urge such irregularities under the circumstances.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., pro tem., concur.



58 Cal.App.2d 709

**WATSON et al. v. SANTA CARMELITA  
MUT. WATER CO. et al.**

Civ. 13988.

District Court of Appeal, Second District,  
Division 2, California.

May 21, 1943.

Hearing Denied July 19, 1943.

**1. Waters and water courses**  $\S$  238

A complaint to enjoin collection of assessments by mutual water company, on ground of misrepresentations that water stock would pay large dividends and would be nonassessable, failed to allege "actionable fraud" in absence of declaration that defendants had no intention of performing their promises. Civ.Code,  $\S$  331, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Fraud".

**2. Waters and water courses**  $\S$  238

Where articles of mutual water company provided for assessability of its stock, alleged promise to stock purchaser that stock would be nonassessable could not be "actionable fraud" in view of statutes forbidding distinction between classes of shares. Civ.Code,  $\S$  290, subd. 5;  $\S$  331, subd. 3.

**3. Waters and water courses**  $\S$  238

In determining right to enjoin collection of mutual water company's assessments, owners of water stock were charged with knowledge of law that water corporation may levy assessments upon its shares unless prohibited by its articles or by-laws. Civ.Code,  $\S$  331, subd. 3.

**4. Waters and water courses**  $\S$  238

Where mutual water company's by-laws did not prohibit assessments, statute authorizing assessments and company's articles became part of agreement to purchase water stock, so that purchasers must have known that stock would be assessable. Civ.Code,  $\S$  331, subd. 3.

**5. Fraud**  $\S$  31

Where land is purchased on false promises by vendors, purchasers may deny the contract and seek rescission, or may affirm the contract and seek damages. Civ. Code,  $\S\S$  1689-1691.

**6. Waters and water courses**  $\S$  238

Purchasers of mutual water company's stock, claiming that representations were

made that stock would be nonassessable, could not rescind part of contract and retain the benefits. Civ.Code,  $\S$  331, subd. 3;  $\S\S$  1689-1691.

**7. Waters and water courses**  $\S$  238

The conformance by mutual water company with statute relating to contents of certificates for shares is irrelevant in determining liability of shareholder who is not a transferee for an assessment. Civ. Code,  $\S$  326;  $\S$  331, subd. 3.

**8. Corporations**  $\S$  95

The purpose of statute relating to contents of certificates for shares is to protect transferee against undisclosed restrictions affecting his shares, unless they are stated on face of certificate. Civ.Code,  $\S$  326.

**9. Waters and water courses**  $\S$  238

Where assessments on mutual water company's stock were levied in accordance with statute and for proper purpose, that persons causing such levy might have intended to advance their selfish interests was irrelevant in determining validity of assessments. Civ.Code,  $\S$  331, subd. 3.

**10. Waters and water courses**  $\S$  238

The test of validity of acts of mutual water company directors in levying assessments is whether levy was authorized by law and was necessary for maintenance of company, and need for assessment is for directors. Civ.Code,  $\S$  331, subd. 3.

**11. Limitation of actions**  $\S$  179(2)

The bar of statute of limitations regarding actions based on fraud cannot be obviated by mere declaration that plaintiff had no knowledge of fraud until about the time of filing of complaint. Code Civ. Proc.  $\S$  338.

**12. Limitation of actions**  $\S$  179(2)

To avoid bar of statute of limitations regarding actions based on fraud, plaintiff must plead the time when fraud was discovered, must state circumstances under which discovery was made, and must show that delay in filing action is consistent with requisite diligence. Code Civ.Proc.  $\S$  338.

**13. Limitation of actions**  $\S$  179(2)

The reasons assigned for plaintiff's failure to make discovery of alleged fraud until within three years prior to commencement of action constitute an element of plaintiff's right of action and must be

affirmatively pleaded. Code Civ.Proc. § 338. Civ.Code, § 331, subd. 3; Code Civ.Proc. § 382.

#### 14. Limitation of actions ⇨179(2)

If pleading reveals that plaintiff should have been put on inquiry into truth of representations made, then he will be deemed to have actual knowledge from date he was put on notice, in determining whether action is barred by limitation. Code Civ.Proc. § 338.

#### 15. Limitation of actions ⇨179(2)

In determining whether action for fraud is barred by limitation, discovery of fraud on certain date is a "question of law" which must be determined from the allegations. Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

#### 16. Limitation of actions ⇨67

An irrigation company's demand from purchasers of mutual water company's stock for reimbursement of assessments paid was tantamount to demand for payment of assessments directly to water company in so far as it gave purchasers "notice" of their obligations to pay assessments, which commenced the running of limitation statute. Civ.Code, § 331, subd. 3; Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

#### 17. Waters and water courses ⇨238

The reimbursement by purchasers of mutual water company's stock of assessments paid by irrigation company, after knowledge of alleged fraud, constituted a "ratification" of purchase contract, as against contention that reimbursement was an "involuntary payment", because of threat of suit by irrigation company. Civ. Code, § 331, subd. 3; Code Civ.Proc. § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Payment".

#### 18. Waters and water courses ⇨238

A representative suit to enjoin collection of assessments by mutual water company, for fraudulent misrepresentations made separately to plaintiffs and 1,500 other investors, was not maintainable on ground of lack of "privity of estate", where there was no allegation of common ground between plaintiffs and unnamed

group. Civ.Code, § 331, subd. 3; Code Civ.Proc. § 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity of Estate".

#### 19. Parties ⇨11

A "representative suit" is proper only to conserve common fund or property in which all of those represented have an interest, and it may not be used to reinforce claim of one who merely seeks relief against promoters alleged to have deceived plaintiff and his fellow stockholders. Code Civ.Proc. § 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Representative Suit".

#### 20. Injunction ⇨1

A cause of action must exist before injunctive relief can be granted.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by Elmer H. Watson and another against the Santa Carmelita Mutual Water Company and others for an injunction to inhibit collection of assessments by named defendant. From an order granting a preliminary injunction, and from an order refusing to modify the injunction, the named defendant and others appeal.

Reversed.

Jerrell Babb, of Los Angeles, for plaintiffs and respondents.

Mitchell, Silberberg & Knupp and Guy Knupp, all of Los Angeles, for appellants.

MOORE, Presiding Justice.

The question for decision is whether the complaint in a representative suit for an injunction to inhibit the collection of assessments by a mutual water company states a cause of action where the basis of the action is the alleged fraudulent misrepresentations made separately to plaintiffs and 1500 other investors in the company's stock.

A preliminary injunction having been granted by order of October 4, 1942, upon the complaint, the appellants were restrained from collecting the assessment levied by defendant Water Company on June 10, 1942, against plaintiffs and "holders of shares" in that Company, and from forfeiting such shares or "adding a penalty

to the amount of the assessment \* \* \* and from suing \* \* \* for the collection of said assessment during the pendency of the action." Appeal was taken from that order and from the order refusing to modify the injunction.

The complaint is a voluminous document. Reduced to the narrowest confines compatible with the instant requirements, it alleges that in 1931 a conspiracy was entered into by the natural defendants to defraud plaintiffs and 1500 other persons. Pursuant thereto they acquired a desert acreage which they named Santa Carmelita, Unit No. 10. They organized the corporate defendants herein respectively referred to as Water Company, the Palm Springs Company and Kiener. It lay eighteen miles from Palm Springs. They subdivided it into small lots and named the place La Quinta. By making representations as to the improvements to be made, they sold plaintiffs lot 2, Block 82. The only statements emphasized as having been fraudulent representations inducing the purchases were that upon payment of the full purchase price of a lot plaintiffs as well as the other unnamed buyers would receive a deed and stock in the mutual, non-profit water company whose shares should be appurtenant to the lands of La Quinta; that such stock would pay large annual dividends to the holder; that payment of no assessments would ever be required, but only the charges for the water used on the lot purchased; that the water company would be maintained "at the total expense of defendants," only. Notwithstanding such promises the complaint declares the incorporation in 1934 of the Water Company whose articles authorized the issuance of "service" and "non-service" shares; that uniform assessments might be levied upon the "service" shares if located on specific parcels. Two "service" shares were issued to plaintiffs. The assessment whose collection was restrained, was levied June 10, 1942, in the sum of \$3.50 per share, upon all of the 9000 "service" shares held by plaintiffs and the 1500 other unnamed shareholders on whose behalf the action is prosecuted.

After the preliminary injunction had issued, defendants took the deposition of Elmer Watson whereby they purposed to demonstrate that the allegations as to misrepresentations made by defendants to purchasers other than plaintiffs were hearsay. Notwithstanding the production of

such evidence, the motion for a modification of the temporary writ was denied. Neither rescission nor damages is sought. The action is solely for an injunction to restrain the performance of official duty by officers of the Water Company.

Appellants contend that the injunction should not have been issued for the reasons that: (1) The complaint does not state facts sufficient to authorize an injunction; (2) the action is barred by the statute of limitations and by the laches of plaintiff; (3) the facts do not warrant a representative suit; (4) the court erred in refusing to modify the injunction in limiting its application to the protection of plaintiffs only.

[1] Measuring the complaint by its factual content, it appears to be fatally defective. The grievance alleged as the ground for action is that all of the defendants represented that the water stock would pay large dividends and that the owners thereof "would not be required to pay any assessments of any nature whatsoever; \* \* \* that said water stock would be non-assessable for any purpose." These allegations refer to acts to be done in the future. In the absence of declaration that defendants had no intention of performing their promises, they do not constitute actionable fraud. *Trube v. Katz*, 60 Cal.App. 474, 213 P. 264; *Meehan v. Huntington Land & Improvement Company*, 39 Cal.App.2d 349, 103 P.2d 196.

[2-4] It appears from the pleading that the Water Company was organized long prior to the purchase of their lot by plaintiffs. Its articles are shown to have provided for the assessability of its stock. It follows that the alleged promise could not be actionable fraud for the further reason that it was in violation of subd. 5 of Section 290 of the Civil Code which forbids any distinction to exist between classes of shares except as imposed by the articles. The promise by defendants that certain shares should be non-assessable would create a preference in violation of the cited section and could not constitute actionable fraud. *Martin v. Palmer Union Oil Co.*, 184 Cal. 386, 193 P. 950. If the directors of a corporation could contract to give stock preferences which are not authorized, then the sovereignty would be transcended by its own creature and the directors could do that which the legislature has studiously excluded from the corporate privileges. If the directors of the corporation are for-



bidden to enter into contract for the purpose of giving preference to the shares sold, the inhibition applies with equal force to a representation made that the shares "would be nonassessable." Plaintiffs are charged with knowledge of the law that any corporation engaged in supplying water for domestic and irrigation uses and not a public utility, may levy assessments upon its shares unless otherwise provided in its articles or by-laws. Civil Code, section 331, Subd. 3. Since no claim is made that the by-laws prohibit assessments both the statute and the articles unimpaired become a part of the plaintiffs' agreement to purchase the same as though they were copied into the contract. *Bottle Mining & Milling Co. v. Kern*, 9 Cal.App. 527, 531, 99 P. 994. Therefore, they must have known their stock would be assessable.

[5,6] While plaintiffs confess themselves to be aggrieved by reason of the alleged promises yet they cling avidly to their investment. Not a murmur is made of their desire to rescind the purchase; neither do they declare for damages. Nor has any of the unnamed 1500 asked for a return to the status quo. Where investors purchase lands upon false promises by the vendors as to certain privileges to be conferred upon them, lawful measures are available to enforce their right: they either affirm or deny the contract. If they deny the contract, the course provided by statute is to rescind. Civil Code, §§ 1689-1691. If they do not rescind, their only alternative is to affirm the contract and seek damages. Inasmuch as rescission is not suggested by the complaint necessarily the remedy sought must be legal. If it is an action for damages on account of the alleged fraud there is no occasion for the interposition of equity. Their failure to proceed by either course familiar to complainants in such situations does not entitle them to a new dispensation. Plaintiffs can not alter the agreement made with defendants to suit their own convenience. They are obliged now either to disavow it or to affirm it. They cannot rescind the part that is disagreeable and retain such benefits as they may deem advantageous. *Buena Vista Co. v. Tuohy*, 107 Cal. 243, 40 P. 386.

[7,8] Plaintiffs allege that the certificate issued to them did not provide on its face the rights granted and the restrictions imposed upon the respective classes of shares and the number constituting each class, as required by section 326 of the

Civil Code. The conformance with 326 by a mutual water company is irrelevant in determining the liability of the shareholder, who is not a transferee, for an assessment. The purpose of section 326 of the Civil Code is to protect the transferee of such a certificate against "undisclosed liens, powers or restrictions which vitally affect his shares", unless they are stated on the face of the certificate. *Wilson v. Cherokee Drift Mining Co.*, 14 Cal.2d 56, 92 P.2d 802, 803.

[9,10] Although the complaint contains no suggestion that the assessment was not for the benefit of the Water Company or that it was excessive, it attacks the levy on the ground that defendants caused the assessment to be made in aid of the sales of La Quinta lands. Inasmuch as the assessments were levied in accordance with the statute, and for a proper purpose, and with advantage to the company it is immaterial that the defendants, in causing such levy, might have intended to advance their selfish interests as well. Such motive on the part of defendants is irrelevant in determining the validity of assessment. *Clark v. Oceano Beach Resort Co.*, 106 Cal.App. 574, 289 P. 946; *Glenn v. California Trona Co.*, 38 Cal.App. 601, 602-604, 177 P. 178. The test of the validity of the acts of directors in levying assessments is whether the levy was authorized by law and was necessary for the maintenance of the water company or to pay its debts. There is no allegation that it was unnecessary. The decision as to the need for the assessment is to be made only by the directors. *Clark v. Oceano Beach Resort Co.*, supra.

[11-15] 2. The action appears to be barred by the provisions of Section 338 of the Code of Civil Procedure. The contract was executed January 17, 1935. The complaint was filed on July 15, 1942. While Section 338 provides that a cause of action based upon fraud is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, yet the bar of the statute cannot be obviated by the mere declaration that the plaintiff had no knowledge of the fraud until about the time of the filing of his complaint. *Kelly v. Longan*, 5 Cal.2d 274, 53 P.2d 971; *Bainbridge v. Stoner*, 16 Cal.2d 423, 106 P. 2d 423; *Original Mining & Milling Company v. Casad*, 210 Cal. 71, 290 P. 456. In order to avoid the bar of the statute the plaintiff must plead the time when the fraud was discovered and of what the dis-

covery consisted that the court may clearly see whether by reasonable diligence the discovery might not have been made before. He must fully state the circumstances under which the discovery was made and must show that the delay in filing the action is consistent with the requisite diligence. *Phelps v. Grady*, 168 Cal. 73, 141 P. 926. The reasons assigned by plaintiff for his failure to make a discovery of the facts constituting the alleged fraud until within three years prior to the commencement of his action are an element of plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. He must show that the acts complained of were committed at such times and in such manner as to conceal them from plaintiff. Also, he must allege facts to show the occasions on which the deceitful acts were disclosed to him in order that the court may decide whether his discovery was within the time alleged. If the pleading reveals that plaintiff knew of events that should have put him on inquiry into the truth of the representations made to him, then he will be deemed to have actual knowledge from the date he was put on notice. Whether there has been a discovery on a certain date is a question of law which must be determined from the allegations. "It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence and has not been informed of them until within the three years." *Original Mining & Milling Company v. Casad*, supra, 210 Cal. 74, 290 P. 457; *Lady Washington Company v. Wood*, 113 Cal. 482, 45 P. 809. Notwithstanding such requirements plaintiffs offer no excuse for their delay in bringing this action.

In this connection two significant facts must be emphasized: (a) The contract of purchase provides that the water system shall be owned and operated by defendant Water Company of which Buyer may become a member; that Seller shall bear the initial cost of developing the water system; that Buyer shall pay for water in accordance with rules of the Water Company; that with delivery of his deed to Buyer he shall receive one share of stock in the Water Company for each half lot, the water to be appurtenant to the land. (b) While the complaint makes no mention of the demand for the payment of the first two assessments on plaintiffs' lot, the undenied affidavit of defendant Harry Kiener discloses that during the period of the con-

tract of purchase, and prior to the delivery of the deed and the certificate of the two shares, two assessments had been made by the Water Company. The assessments on plaintiffs' shares were as follows: \$5 per share on December 14, 1936; \$3.50 per share on June 8, 1938. The deed and the shares in the Water Company were delivered to plaintiffs on the 8th day of May, 1939. At the same time a bill in the sum of \$17 from the Palm Springs Company demanding reimbursement for the two assessments which it had theretofore paid was also delivered to plaintiffs who reimbursed Palm Springs Company for such assessments. The waiver effected by such reimbursement plaintiffs now seek to avoid.

[16] According to the affidavit of Elmer Watson because of the threat of the Palm Springs Company "and in fear of a lawsuit \* \* \* and to avoid the expenses of a lawsuit and to buy their peace they paid said \$17 \* \* \* to avoid a law suit and the expenses therewith, although they did not owe it." But such arguments and conclusions do not dispel the inferences to be drawn from the demand of May 8, 1939, and from the language of the contract of purchase. The demand for reimbursement of the Palm Springs Company was tantamount to a demand for payment of the two assessments directly to the Water Company in so far as it gave plaintiffs notice of their obligation to pay assessments which commenced the running of the period prescribed by section 338, Code of Civil Procedure.

The position of the plaintiffs with respect to the reimbursement of the Palm Springs Company for the amount of the two assessments levied prior to the delivery of the deed and water shares to plaintiffs does not differ from that of a stockholder who after discovering that he had been induced by fraud to purchase corporate stock voted for the levy of an assessment upon the stock of the corporation and thereafter paid his assessment without objection. Under either situation the action of the stockholder is in effect a ratification of the contract after knowledge of the alleged fraud. *Marten v. Burns Wine Co.*, 99 Cal. 355, 357, 33 P. 1107; *Campbell v. Santa Maria Oil & Gas Co.*, 153 Cal. 282, 283, 95 P. 39; *Rogers v. Baird*, Sup., 167 N.Y.S. 35, 36; *Macon, etc., Co. v. Vason*, 57 Ga. 314.

[17] The claim that the payment of the \$17 was involuntary because of the threat

made by the Palm Springs Company to sue finds no support in the law. Had the Palm Springs Company actually instituted an action to recover the amount of its bill, payment by plaintiffs would not have been involuntary. 48 Corpus Juris 748, section 299; 40 American Jurisprudence 833, section 174. If the actual filing of an action does not render a payment by the defendant involuntary surely a mere threat to sue could amount to no more.

[18, 19] 3. There is no proper basis for filing a representative suit and for that reason an injunction forbidding defendants to enforce the collection of the assessments against the 1500 unnamed shareholders was unwarranted. There is no allegation of a common ground on which plaintiffs and their unnamed group may stand. There is no fund in which plaintiffs and the unnamed persons have a common interest; no property is mentioned in which the unnamed have an interest in common with plaintiffs; nothing to show that the 1500 are necessary parties to the action. It is only in those cases where the represented group is so united in interest with the actual plaintiff in the action as to make them necessary parties under the statute. Section 382, Code Civ.Proc. A representative suit is proper only where the action is for the purpose of conserving a common fund or property in which all of those represented have an interest. It may not be used to reinforce the claim of one who merely seeks relief against promoters who are alleged to have deceived plaintiff and his fellow stockholders in the sales of corporate shares. By no principle of legalistic logic does it appear that the unnamed 1500 are necessary to the prosecution by plaintiffs of their action. Plaintiffs allege that they were defrauded by deceitful representations made to them by defendants. Such representations do not necessarily affect the rights of their unnamed companions. Plaintiffs may proceed without let or hindrance against the defendants upon whatsoever grievances they deem themselves to have suffered. In the event of their recovery, the judgment would not transfer any advantages to those unnamed. If they lose in the contest, the 1500 uncomplaining shareholders are still possessed of any claims they may have had against defendants. Plaintiffs' causes of action, if any, against defendants are several and distinct from the rights of the 1500. There is no privity of estate between plaintiffs and the unnamed group. *Carey v. Brown*, 58 Cal.

180; *Ballin v. Los Angeles County Fair*, 43 Cal.App.2d Supp. 884, 111 P.2d 753.

In view of the foregoing conclusions, a discussion of the fourth proposition is unnecessary.

[20] Respondents rely upon the proposition that the trial court did not abuse its discretion in granting the injunction or in refusing to dissolve the temporary injunction after it had been granted. But such argument applies only where the pleading is sufficient and the proof offered in support of the complaint merely complies with the rule requiring substantial support. A cause of action must exist before injunctive relief can be granted. *Williams v. Southern Pacific R. Co.*, 150 Cal. 624, 89 P. 599; *Shell Oil Co. v. Richter*, 52 Cal.App.2d 164, 125 P.2d 930.

Both orders are reversed.

W. J. WOOD and McCOMB, JJ., concur.



58 Cal.App.2d 599

**SHALZ v. UNION SCHOOL DIST. et al.**

Civ. 6768.

District Court of Appeal, Third District,  
California.

May 18, 1943.

#### 1. Master and servant ☞69

In determining whether an amount was properly withheld from final payment due contractor on contract for construction of school building, as penalty for violating Labor Code, that certain employees testified that they voluntarily signed agreement and were satisfied with arrangement under which daily deduction from stipulated pay was made purportedly for lodging and transportation furnished by contractor was not controlling factor, since employees could not sanction evasion of law. *St.1937*, pp. 200, 243, §§ 219, 223, 224, 1770, 1772-1775.

#### 2. Schools and school districts ☞121

Evidence sustained judgment denying recovery of amount withheld from final payment due contractor on contract for



construction of school, as penalties for violating Labor Code relating to wages, on ground that deductions from stipulated pay of employees which were purportedly made for lodging and transportation were exorbitant, and were used as a device to reduce wage scale of employees. St.1937, pp. 200, 243, §§ 219, 223, 224, 1770, 1772-1775.

### 3. Master and servant ⇐83

The intent of statute requiring employers to pay to employees employed on public work prevailing rate of wages as determined by body awarding the contract is the recovery of penalty by way of indemnity to the public by reason of violation of the statute, and to charge employer with pecuniary liability, and not to punish employer, and such intent is not to be defeated by overnice construction. St.1937, p. 243, §§ 1770, 1772-1775.

### 4. Penalties ⇐1

The Legislature may impose any reasonable penalty it sees fit for violation of valid regulations.

### 5. Penalties ⇐1

There is no inhibition on state to impose such penalties for disregard of its police power as will insure prompt obedience to the requirements of such regulations.

### 6. Schools and school districts ⇐121

In action for an amount withheld from final payment due contractor on contract for construction of school building, as penalty for contractor's alleged violation of Labor Code relating to wages, contractor had burden of proving acts constituting a legal excuse. St.1937, pp. 200, 243, §§ 219, 223, 224, 1770, 1772-1775.

### 7. Master and servant ⇐69

Employees employed on public work and paid prevailing wage as required by law may agree with contractor for proper and reasonable deductions from pay for lodging and transportation furnished by contractor. St.1937, pp. 200, 243, §§ 219, 223, 224, 1770, 1772-1775.

### 8. Constitutional law ⇐70(3)

It is within province of Legislature to adopt measures to reduce evils of exploiting of wages and the courts are unauthorized to deal with question of policy of enacting such measures.

### 9. Constitutional law ⇐48

Every presumption is in favor of validity of minimum wage legislation which has been found to be necessary by the Legislature, such as legislation regarding wages paid to workmen employed on public work. St.1937, pp. 200, 243, §§ 219, 223, 224, 1770, 1772-1775.

Appeal from Superior Court, Shasta County; Charles A. Paulsen, Judge Assigned.

Action by William J. Shalz against the Union School District and others to recover an amount withheld from final payment due the plaintiff on contract to construct school, as penalty for alleged infractions of the Labor Code by the plaintiff. From an adverse judgment, and from an order granting motion for new trial on sole ground of amount of penalty, the plaintiff appeals.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Irving Shore, of Los Angeles, and Laurence W. Carr, of Redding, for respondents.

PEEK, Justice.

The plaintiff was a building contractor duly licensed by the State of California, and doing business under the fictitious name of Shalz Construction Company. The defendants were and are a school district and the members of its board of trustees.

On December 9, 1939, plaintiff and defendant district entered into a contract whereby plaintiff agreed to reconstruct for defendant a public school building approximately nine miles from the city of Redding, at a place more commonly known as Boomtown.

The contract, among other things, provided that the work would be done in accordance with plans and specifications provided by the Department of Education of the State of California, and the contractor agreed to conform to a certain resolution previously adopted by the school district with reference to minimum wages, hours of work, etc. The provisions contained in the resolution were in accordance with sections 1770, 1772, 1773 and 1774 of the Labor Code of California, St.1937, p. 243; the pertinent portions of these sections read as follows:

1770. "The body awarding the contract \* \* \* shall determine the general prevailing rate of per diem wages and its decision \* \* \* shall be final."

1772. "Workmen employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

"1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft or type of workmen needed to execute the contract, and shall specify in the call for bids for the contract, and in the contract itself, what the general prevailing rate of per diem wages and the general prevailing rate for legal holiday and overtime work in the locality is for each craft or type of workman needed to execute the contract."

"1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract."

Prior to the completion of the building the State Labor Commissioner ordered a hearing in the city of Chico to determine whether or not penalties should be assessed against plaintiff for certain alleged infractions of the Labor Code, by virtue of a charge by plaintiff of \$1.60 per day for lodging facilities in the building owned by the district, and transportation furnished to his employees, which sum was deducted from their wages. Section 1775 of said code under which the penalties may be assessed, reads in part as follows: "The contractor shall, as a penalty to the State or political subdivision on whose behalf the contract is made or awarded, forfeit ten dollars [\$10] for each calendar day, or portion thereof, for each workman paid less than the stipulated prevailing rates for any public work done under the contract by him or by any subcontractor under him \* \* \*."

At the conclusion of the hearing a finding was made that plaintiff had violated the terms of the code and the contract in 288 instances, and a penalty was assessed against him in the sum of \$2,880, being \$10 for each separate violation. Thereupon the commission directed the school district and its trustees to withhold said sum from the final payment due plaintiff under his contract, and such sum was so withheld.

Plaintiff then instituted an action in the Superior Court of Shasta County to recover from the district the amount so held by it. The only issue raised by the pleadings is the legality of the charge of \$1.60 per day, plaintiff contending that such deduction was a proper charge for the lodging and transportation furnished, and that he had paid his workers in accordance with the schedule adopted by the trustees of the district. The labor commissioner contends that the employees received less than the prevailing wages because of the deductions previously mentioned, that such deductions were exorbitant and therefore a subterfuge to escape the provisions of the code. To substantiate his contention the commissioner introduced evidence tending to show that housekeeping cabins could have been rented a short distance from the school for \$5 per week. At the conclusion of the trial the court found that, "The plaintiff's expenditures for the crude accommodations furnished the men could have been fully compensated for by a deduction of not more than ten or fifteen cents per man per day, and the plaintiff was unable to state the basis for his charge of \$1.60 per day. The men could have secured much better accommodations in the neighborhood for less than half the sums deducted." And that, "The housing plan devised by the plaintiff was a subterfuge designed to reduce the prescribed wage scale; \* \* \*"

From the adverse judgment of the trial court and the granting of the motion for a new trial on the sole ground of the amount of the penalties, plaintiff appeals, raising a further contention that statutes imposing penalties must be strictly construed with the evidence clear and convincing that the statute has been violated, and that the deductions made by respondent were neither legitimate nor authorized by section 224 of the Labor Code, which provides: "The provisions of sections 221, 222, and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by State or Federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute." (Italics ours.)

Plaintiff asserts that the deductions made by him were authorized "by a valid and legal agreement" and denies "that the purpose and intent of said deductions was to evade the provisions of the \* \* \* construction agreement or any provision of the labor code."

The evidence shows that the contractor maintained his headquarters at Chico, that for some time prior to the execution of the contract involved he had intermittently employed several carpenters in the city of Chico, and that these men were usually paid the union scale prevailing in that city, which scale was from one to two dollars less than the scale prevailing at Redding and the scale fixed by the trustees of the school district. Plaintiff brought these men to Redding from Chico. At or about the time of the execution of the contract, seven of the eight men employed by plaintiff signed the following statement: "We the undersigned employees of Wm. J. Shalz agree to pay the sum of \$1.60 per day to Wm. J. Shalz for every day for the use of camping in the school building now under construction by Wm. J. Shalz, and each of us further agree, and direct him to deduct this sum from our wages. It is further understood and agreed by each of us and by Wm. J. Shalz that in the event the sum so charged and deducted from our wages, does not equal the Union Wages in the school contract said Wm. J. Shalz agrees to pay such additional wages, if any, to equal the Union wages upon completion and acceptance of the school building."

Several of the workmen testified that the arrangement was entirely voluntary, that they were satisfied with it, that on days when they lost time because of rain no deductions were made, but that on work days the sum of \$1.60 was deducted from the regular wage. Although a Mr. Alexander, one of the employees, denied that execution of the agreement was a condition to getting a job, when asked on cross-examination: "When you signed this agreement did you have in mind the thought that perhaps you would not be employed by Mr. Shalz if you refused to sign the agreement?" he replied: "Well, I don't know about that. You can't read between the lines."

The entire facilities which were furnished the men and which plaintiff contends justified the charge of \$1.60 per day per man appear in the record as follows: As

a part of the construction work three sides of the building were removed. To enclose the exposed sides plaintiff furnished canvas and lumber, and the men did the work. They slept in whichever of the three rooms in the building they desired. An electric grill was furnished by one of the employees who also did the necessary wiring to hook it on to the main current—four of the men ate elsewhere and therefore did not use the grill—the cost of its operation was paid by plaintiff. For heating purposes plaintiff furnished a wood stove and gave permission to use the waste lumber on the job for firewood, additional wood, if needed, could be secured from the surrounding hills. An undetermined amount of gasoline was furnished by plaintiff on several occasions, but at such times he usually rode with them. It was stipulated that water and toilet facilities would have had to be installed regardless of the men's use of the building. The employees also furnished all of their bedding and equipment, which fact was not controverted.

Plaintiff was asked, by both court and counsel, to state the basis for his charge of \$1.60 per day but no satisfactory answer to these questions was given. His sole explanation was that he had a right to charge what he pleased.

The labor commissioner does not contend that an employer cannot lawfully contract with his employees to furnish them with services such as were here furnished. However, he does contend that the contract in the present case was a mere subterfuge calculated to reduce the prescribed wage scale, and that therefore it came within the provisions of section 219 of the Labor Code, that "no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied." Also section 223 of the Labor Code, which reads: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."

[1] The fact that some of the men testified that they voluntarily signed the agreement and were satisfied with the arrangement is not a controlling factor. They could not sanction the evasion of the law if that was either the intent or the effect of the contract.

[2] The evidence presented to the trial court amply justified the finding that the



charges made were exorbitant and entirely out of proportion to the services rendered and were used as a device to reduce the wage scale.

The constitutionality of requiring payment of the prevailing wages on public works and impositions of penalties for violations thereof has been sustained (*Metropolitan Water District v. Whitsett*, 215 Cal. 400, 10 P.2d 751) and is not in question here. However, the validity of deductions coupled with an agreement to pay prevailing wages as is involved herein has not been adjudicated previously, and is a question of the first instance in this state.

In support of his contention that such deductions are valid, plaintiff cites the case of *Schumann v. California Cotton Credit Corp.*, 105 Cal.App. 136, 137, 286 P. 1068, 1070, from which he quotes: "Wage is compensation for services rendered, and this compensation may take the form of money paid or other value given, such as board, lodging, or clothes."

We do not feel that this case is in point. The decision involves the construction of a contract to finance a cotton crop, and the reviewing court held that picking advances were not limited to the actual amount paid per pound for the cotton picked but included other expenses such as sacks used by the pickers, the wages of the weigher, and the rent of tents or other living quarters for the pickers.

Likewise, *Sublett v. Henry's Turk & Taylor Lunch*, 21 Cal.2d 273, 131 P.2d 369, also cited by plaintiff, is not determinative of the issue herein. In that case the trial court rendered judgment in favor of plaintiff for the amount of wages he was compelled to "kickback" to the employer; the Supreme Court reversed the judgment because the finding of the trial court that the workman was a third party beneficiary of a written contract with the union, was not sustained by the evidence which failed to establish a contract in writing. The judgment was reversed with directions to allow amendments to the pleadings to conform to the proof if sufficient evidence were produced to show an oral contract existed between the union and the employer for the benefit of the plaintiff.

Plaintiff cites several cases as further authority in support of his first contention that "penalties are to be strictly construed," but the cases cited by plaintiff in sub-

stantiation of his position, although correct as far as they go, are not comparable to the situation presented in the present case.

[3] The purpose and intent of the act is plain and its object should not be defeated by overnice construction. 20 Cal.Jur. 981. It is not the punishment of the offender in the sense ordinarily applicable to the term, but rather the recovery of the penalty as a fixed sum by way of indemnity to the public by reason of the violation of the statute and to charge him with a pecuniary liability.

[4,5] Here we are presented with a question concerning the power of the state to impose penalties for violation of its statutory functions, the prescription of which is entirely a legislative matter. It is the usual method imposed to compel the performance of duties or conduct required by the state in carrying out its varied sovereign functions. Thus a Legislature may impose any reasonable penalty it sees fit for the violation of valid regulations. There is no inhibition upon the state to impose such penalties for disregard of its police power as will insure prompt obedience to the requirements of such regulations. 23 Am.Jur. 626.

[6] The present case arose out of a previous hearing before the state labor commissioner wherein the commissioner made certain findings imposing the penalties in question. This is not an action to invoke a penalty, it is an action whereby plaintiff seeks a return of the funds previously assessed as a penalty and withheld from plaintiff by the commissioner's order. Thus the burden of proof is upon the plaintiff to prove acts constituting a legal defense or excuse. This the trial court found the plaintiff did not do. We agree with that finding. The record shows ample evidence to sustain the trial court in this regard.

[7] In determining plaintiff's final contention we feel that we may fairly assume from the wording of section 224 of the Labor Code that it undoubtedly was the express intent of the Legislature to allow proper deductions of the kind involved in this appeal. In this regard we concur with the statement by plaintiff that "under the foregoing provision of the labor code the employees had a perfect right to enter into a written contract with the employer for a deduction," but we do not agree with the balance of his statement "of \$1.60 per day

PEOPLE v. FLORES.

Cr. 3695.

District Court of Appeal, Second District,  
Division 1, California.

May 25, 1943.

from their wages" or "that the court in effect held that wages could not be paid in any other form except money." We do not so understand the findings and conclusions of the court. It merely held that such charges must bear some reasonable relation to the services furnished, and with such statement of the law we are entirely in accord.

[8, 9] It is strictly within the province of the Legislature to adopt measures to reduce the evils of the exploiting of wages. The widespread adoption of similar statutes by so many states evidences a general conviction that minimum wage requirements are definitely in the interest of the general public welfare. Even if the wisdom of the policy is regarded as debatable and its effects uncertain, still the Legislature is entitled to its own judgment. The courts are unauthorized to deal with the question of policy. This is the sole province of the Legislature. It is for the Legislature to determine the necessity of such enactment, and once having so determined it is elementary to add that every presumption is in favor of its validity.

As the late Mr. Justice Holmes said in the case of *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 406, 67 L.Ed. 785, 24 A.L.R. 1238, wherein the District of Columbia Minimum Wage Act, D.C.Code 1940, § 36-401 et seq., was at issue: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as a minimum requirement." This general question also was considered by the United States Supreme Court in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 31 S.Ct. 259, 262, 55 L.Ed. 328, in which the court said: "Freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J.,  
concurring.

1. Larceny ☞65

Circumstantial evidence did not support conviction of grand theft of automobile.

2. Larceny ☞1

The essence of "grand theft" is felonious stealing, taking or driving away the personal property of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

3. Criminal law ☞552(4)

The law makes no distinction between direct and circumstantial evidence in degree of proof required for conviction, but only requires that guilt be established beyond a reasonable doubt in either case.

4. Criminal law ☞552(3)

Circumstances relied upon to establish guilt of one accused of crime must be consistent with hypothesis of guilt and inconsistent with any other rational conclusion.

5. Larceny ☞64(1)

Where stolen property comes into possession of accused shortly after being stolen, accused's failure to show that such possession was honestly acquired is a circumstance tending to show guilt.

6. Criminal law ☞745

Ordinarily, deduction to be drawn from circumstances shown in evidence is for trier of facts.

7. Criminal law ☞306

An incriminating circumstance from which guilt may be inferred must not rest on conjecture, and it is not permissible to pile conjecture upon conjecture.

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Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Jesus Duarte Flores was convicted of grand theft, and he appeals.

Attempted appeal from sentence dismissed; judgment reversed and remanded.

B. Warren Vinetz, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This appeal is prosecuted by defendant from a judgment of conviction of the crime of grand theft rendered against him after trial by the court sitting without a jury.

[1] Stated in a light most favorable to the prosecution, as is required following a guilty verdict or decision, the facts as disclosed by the record are that about 10 o'clock on the evening of November 22, 1942, Mrs. Gladys Newberry, accompanied by a friend, parked her automobile at 1542½ Cassil Place in the Hollywood district of Los Angeles. The doors of the vehicle were not locked but the ignition was. When Mrs. Newberry and her friend returned for the automobile about 10:15 p.m., it had disappeared. Several days later it was recovered in a parking lot on North Figueroa Street several miles distant from Hollywood. At the trial Mrs. Newberry's friend testified that he was driving her automobile on the evening in question; that at the time he parked the car prior to its disappearance it was equipped with one rear vision mirror located on the top center of the front windshield; that the mirror was adjusted "So that I could see out the rear of the car" while seated in the driver's seat. This witness further testified that the front seat of the vehicle was wide enough to carry three passengers comfortably.

George O. Vincent, a finger print expert and attached to the scientific investigation division of the latent finger print section of the Los Angeles Police Department, testified that he photographed a finger print on the back of the rear view mirror; that such finger print was identical with the finger print he had made of the same finger on appellant's hand; that the photograph of the finger print taken on the back of the mirror indicated "the extreme end of the little finger was pointing toward the left-hand side of the car and slightly down".

Mrs. Maude Lathrop testified for the prosecution that she and her friend, Mrs. Jennie Wood, were walking in the vicinity of the place from which the automobile in question was stolen about 10 o'clock on the evening of the theft when an automobile, identified by her as being similar in make

and type to the stolen car, stopped alongside the curb. Two young men alighted from the vehicle, came up behind the two ladies and grabbed their purses. This witness stated that she observed that the automobile was driven by a third party but could not state whether the driver was a man or woman. Mrs. Lathrop also identified the two men who took the purses as Robert Campos and Roberto Valles. This identification assumes importance because the record indicates that Valles, one of the men who was later arrested for the theft of the purses, testified at defendant's trial herein, while the other man identified by Mrs. Lathrop as participating in the larceny of the purses was killed while resisting arrest on the charge of stealing the automobile with which we are here concerned.

Appellant took the witness stand in his own behalf, testifying that he had known Robert Campos for about nine months but had only seen Roberto Valles twice; that on the night here in question he had retired about 9:30 p.m., because he was ill and for the further reason that he was on parole from state prison and the terms of his parole required him to be at home at a reasonable hour each night. Appellant further testified that on the night of November 22, 1942, Robert Campos called to see appellant at the latter's home about 10:30 or 11 p.m. At this time, appellant testified, he arose from bed, dressed and went down the alley to where the car was parked, to talk with Campos so that appellant's mother, who was asleep in the house would not be disturbed. According to appellant, he and Campos sat in the automobile, the latter occupying the driver's seat while appellant sat alongside of him. He further testified that Campos urged him to go to a dance which he agreed to do, but the record indicates that he did not go away with Campos. However, it appears from appellant's testimony that he and Campos returned to the house where he supplied Campos with some clean clothing. While they were in the house and Campos was changing his clothing, appellant, according to his testimony, asked Campos about the automobile and finally was told that it was a stolen car. Appellant consistently denied that he stole the automobile or that he was ever in it except as heretofore narrated. He steadfastly denied that he occupied the driver's seat at any time and that while he had no recollection of touching the



rear view mirror, admitted that he might have done so. The police officer who arrested appellant and questioned him testified that appellant told him that he had never seen the stolen automobile and never had been in it. This appellant admitted, explaining his action in that regard by saying he was afraid of the officers "because I have saw a lot of things going on in that Central Jail; all the boys they picked up they beat them up, even if they admitted some connection with something, and I didn't want to admit that I had anything to do with it at all, and had seen the stolen car, because he would want to take more out of me".

The mother of appellant testified in his behalf stating that he returned home about 9 or 9:30 o'clock on the evening of November 22, 1942; that he was suffering from stomach ulcers; that she spoke to him about 10:45 p.m.; that she was unaware of anyone having visited her son that night but that he was at home throughout the entire night.

Roberto Valles, one of the men identified by Mrs. Lathrop as a participant in the theft of her purse, testified in appellant's behalf that he, Robert Campos and a girl friend of the latter, stole the automobile here in question on the night of November 22, 1942; that Campos' girl friend drove the vehicle and that appellant was not concerned in the theft of the automobile. When, at the time of his arrest, this witness was questioned by the police he too disclaimed all knowledge of the automobile or its theft.

It is first contended by appellant that the evidence is insufficient to support the judgment of conviction. The attorney general now, as did the trial court, attaches much evidentiary importance to the presence of appellant's finger print on the back of the rear vision mirror in the stolen car. Indeed, the trial court at the conclusion of the evidence announced his decision by simply stating "The finger prints tell the tale. The Court adjudges the defendant guilty of the crime of grand theft as charged in the information".

[2-7] The essence of the crime of grand theft as here involved is the felonious stealing, taking or driving away the personal property of another, and our examination of the record has compelled the conclusion that the evidence did not warrant the decision of the court adjudging de-

fendant guilty. The case for the prosecution was circumstantial. While it is true that the law makes no distinction between direct and circumstantial evidence in the degree of proof required for conviction, but only requires that proof of guilt be established beyond a reasonable doubt by evidence of the one character or the other, or both, nevertheless it is elementary law that circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion. At best the testimony concerning the finger print established only the fact that appellant was in the automobile, and that he admitted, but the evidence falls far short of the quantum necessary to overcome the presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt the gravamen of the offense of grand theft which is the asportation of the property. It is the law, as claimed by respondent, that if stolen property comes into the possession of a defendant shortly after being stolen the failure of such person to show that such possession was honestly acquired is a circumstance tending to show guilt, but such an inference is not justified by the circumstances of this case for there was no evidence, direct or otherwise, to show that appellant was at any time in possession of the stolen property. Ordinarily, the deduction to be drawn from the circumstances shown in evidence is for the trier of facts, but in this instance it is manifest that every fact proven is consistent with the reasonable conclusion that the appellant did not participate in the theft of the automobile. There is, therefore, a failure of proof in particulars necessary to conviction of the crime of grand theft, and the question is one of law for the court. Appellant's testimony finds corroboration in the evidence given by Valles who admitted stealing the automobile and who, with Campos, was identified by Mrs. Lathrop as being the two men who emerged from the stolen vehicle and took the purses of herself and her friend shortly after the theft of the automobile. Even though we concede, as we are urged to do by respondent, that appellant's testimony concerning the manner in which his finger print got on the mirror was unsatisfactory, we are still confronted with the fact that giving to the finger print testimony all the probative force claimed for it by respondent, still it does not tend to

establish any of the essential elements of grand theft. As is well said by the learned author of Wharton's Criminal Evidence (volume 2, § 915), "circumstances, trivial in themselves, take on an exaggerated character the moment that suspicion is directed toward a person accused of a crime; and because of this tendency, no circumstances should be admitted that cannot be shown to have a direct and obvious relevancy to the crime charged". While the fact that an accused person has an opportunity to commit the crime with which he is charged may be a circumstance from which, in conjunction with other circumstances, guilt may be conjectured or inferred, it is nevertheless an established precept of law that an incriminating circumstance from which guilt may be inferred must not rest on conjecture. And by the same rule it is not permissible to pile conjecture upon conjecture.

We are not unmindful of the claimed profligate character of appellant, who admitted a prior conviction of a felony, but we are not now concerned with the guilt or innocence of appellant, further than to say that the evidence presented at his trial was insufficient to make out a case of grand theft as charged against him. As

was said by this court in *People v. Braun*, 31 Cal.App.2d 593, at page 603, 88 P.2d 728, at page 732, "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained, is unjust and dangerous to the whole community." *Hurd v. People*, 25 Mich. 405. \* \* \* The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy".

The conclusion at which we have arrived with reference to the insufficiency of the evidence to sustain the judgment of conviction herein renders it unnecessary to give consideration to another ground urged by appellant for a reversal.

No man's liberty should be taken from him upon such a flimsy showing as characterizes the evidentiary features of this case.

The attempted appeal from the sentence is dismissed and for the reasons herein stated, the judgment is reversed and the cause remanded for a new trial.

YORK, P.J., and DORAN, J., concur.

22 Cal.2d 216

**LINNASTRUTH v. MUTUAL BEN.  
HEALTH & ACCIDENT ASS'N.  
L. A. 18502.**

Supreme Court of California.

May 17, 1943.

Rehearing Denied June 14, 1943.

**1. Insurance ⇨175**

Where insured agreed in applications for accident insurance policies that applications should not be binding on insurer until policies were issued and that insurer was not bound by any agent's statements unless written in applications, coverage did not commence on date of applications, solely because agent soliciting them said that it did, in absence of evidence that such agent had authority to bind insurer as to time when liability commenced.

**2. Insurance ⇨138(1)**

The principle that parties may contract as they please, so long as they do not violate law or public policy, applies to insurance contracts.

**3. Insurance ⇨130(3)**

An application for insurance is a proposal, which does not become completed "contract" until it is accepted by insurer on same terms in which offer was made, and if insurer's acceptance thereof modifies or alters any terms of proposal, such modification or alteration must be accepted by applicant to become effective as contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

**4. Insurance ⇨130(4)**

An insurer's delay alone in issuing insurance policy applied for is insufficient to create insurance "contract".

**5. Insurance ⇨130(4), 175**

Where applications for accident insurance policies stated that liability thereon would not attach until policies were issued, neither insurer's retention of premiums paid by applicant until tender of return thereof at trial of action on policies, nor issuance of policies after notice of accident resulting in insured's death, sufficed to impose liability on insurer before date of policies.

CARTER and CURTIS, JJ., and PETERS, J. pro tem., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Belle Linnastruth against the Mutual Benefit Health & Accident Association on accident insurance policies issued to plaintiff's husband. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, Cal.App., 127 P.2d 571.

Lyle W. Rucker and Ray H. Fitzgerald, both of Los Angeles, for appellant.

J. Edward Haley, of Los Angeles, for respondent.

**SHENK, Justice.**

The plaintiff as beneficiary sued on contracts of accident insurance issued to her husband Frank Linnastruth. The trial court, sitting without a jury, rendered judgment for the defendant. The plaintiff appealed. The facts are without substantial conflict.

All of the transactions and events took place in 1940. On July 17, Linnastruth signed applications for two policies of accident insurance of \$1,250 each and paid \$13 as the initial premium on each policy. Each application contained the following as the first paragraph: "I, the undersigned, hereby make application to the Mutual Benefit Health & Accident Association, for policy form M.I.A. 50 on the annual basis. I understand and agree that this application shall not be binding upon the Association until the policy is issued to me."

The initial premiums were paid to the insurance solicitor, Abraham, who dated the applications July 20. On that day the applications and premiums were sent to the company's Los Angeles office, and by that office to the home office in Omaha, Nebraska, for approval of the policies. The applications arrived at the home office on August 1, were approved on August 2, and the two policies were issued, dated August 5, for a term commencing on the date of issue. On August 6, they were taken to Linnastruth's home at Hynes, California, where Linnastruth was lying unconscious from staphylococci septicemia contracted from bodily injuries received in falls which had occurred on July 26 and 30. Linnastruth died on August 6, without regaining consciousness. The plaintiff had sent notice of the accidents to



the association's Los Angeles office on July 30. The notice was received by the home office on August 2. On August 10, the defendant denied liability for the reason that the injuries which resulted in death occurred prior to the date of issuance of the policies. The trial court for the same reason sustained the defense of nonliability interposed by the defendant.

[1] There is no merit in the contention that coverage commenced from the date of the applications solely because at the time applications were made Abraham, the solicitor, said that it did. The plaintiff did not attempt to show by any evidence, except the remark made by Abraham, that the latter had any authority to bind the association as to the time when liability commenced. In addition to the agreement hereinbefore quoted, Linnastruth also expressly agreed in his application that the association was "not bound by any statement made by or to any agent unless written" in the application. It is conceded that the agent had no actual authority to bind the association on a contract of insurance, and the foregoing agreement gave notice that he had no such apparent authority. As noted, the applicant's agreement was that the applications should not be binding upon the association until the policies issued, and inasmuch as the applicant and the association were bound only by the written statements, the rights of the plaintiff depend solely upon the effect of that agreement.

[2,3] The principle that parties may contract as they please so long as they do not violate the law or public policy is applicable to insurance contracts. *Boyer v. United States F. & G. Co.*, 206 Cal. 273, 274 P. 57. Nevertheless the plaintiff seeks to invoke the rule stated in *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 515, 89 P. 130, 10 L.R.A., N.S., 876, 119 Am.St. Rep. 246, 11 Ann.Cas. 801; *Fageol T. & C. Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 747, 117 P.2d 661, and similar cases, that "any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer." [150 Cal. 510, 89 P. 132.] The plaintiff insists that the language used in the applications is susceptible to the construction that upon issuance of the policies the liability of the association commences from the date of the applications, rather than from the date of the issuance. The plaintiff has not presented a case which holds that the rule invoked

is applicable to accomplish the result sought by her. The holdings in the cases relied upon do not support or warrant a conclusion that the words of the applications mean anything more than they purport to state, namely, that liability of the association commences on the date of issuance. On reading the quoted stipulations of the applications the mind, expert or inexperienced, is stopped short of any conclusion that there was any authority for the oral representation of the solicitor. Any reader of the applications must be deemed to be placed with certainty on notice that coverage commenced not when the agent said it did, but upon the issuance of the policies. An application for insurance is a proposal. A meeting of the minds is essential. And the proposal is not a completed contract until it is accepted by the insurer in the same terms in which the offer was made. If the acceptance modifies or alters any of the terms of the proposal, it must then in turn be accepted by the applicant to be effective as a contract. *Burch v. Hartford Fire Ins. Co.*, 85 Cal.App. 542, 552, 259 P. 1108, and cases cited; *Beswick v. National Casualty Co.*, 206 Mo.App. 67, 226 S.W. 1031.

The authorities relied upon by the plaintiff do not support her contentions. On the contrary they are consistent with the inevitable conclusion in this case. In *Toth v. Metropolitan Life Ins. Co.*, 123 Cal.App. 185, 11 P.2d 94, 96, an application written and signed provided that the company should incur no liability under the application until it had been received, approved, and a policy issued, delivered, and the premium paid and accepted by the company in the lifetime of the applicant. The agent had represented that the applicant would be covered as soon as he was examined by the doctor. Two days after the examination the applicant died. No policy issued. In commenting on the provision in the application the court said: "The application provides explicitly that no insurance on the life of decedent was to be in effect until the delivery of the policy and the payment in full of the first premium \* \* \*." If no insurance was to be in effect until issuance or delivery of the policy, the effective date of insurance coverage must coincide with the effective date of liability. To say that liability does not attach until a certain date, but when it does attach on that date, it attaches as of an earlier date, is to place a strained and unwarranted construction on

the plain language employed. In *Stark v. Pioneer Casualty Co.*, 139 Cal.App. 577, 34 P.2d 731, the facts were sufficient to constitute negligence or estoppel on the part of the insurer. In *Hansen v. Farmers' Auto. Inter-Ins. Exch.*, 139 Cal.App. 388, 34 P.2d 188, it was held that apparent authority in the soliciting agent to place in the application the date when liability should commence, did not authorize him to fix a date contrary to the provision of the application that the insurance should become effective when the application was accepted by the home office. The court interpreted the language to indicate coincidence between the dates of acceptance and liability.

[4,5] In *Beswick v. National Casualty Co.*, 206 Mo.App. 67, 226 S.W. 1031, also relied on by the plaintiff, the agent had filled in a date in the application when the policy was to be effective. The applicant had agreed that the application was not to be binding until accepted by the company. The application was accepted and the policy issued, dated, however, a month later than the date inserted by the agent in the application. The plaintiff was accidentally injured in the interim. The court held that the agent had apparent authority to determine the effective date of the application; that the contract commenced as of that date; that the effect of the proposal otherwise was merely to subject the proffered contract of insurance to the approval of the company. The court distinguished factual situations where there was no evidence that the insurance applied for would be effective from the date of the application. In *Douglass v. Mutual Ben. Health & Accident Ass'n*, 42 N.M. 190, 76 P.2d 453, the facts showed that the powers of the agent were attempted to be narrowed by limitations not communicated to the applicant. It was held that, in the absence of express provisions indicating the effective date of the policy and the limitation on the agent's authority, the agent had apparent authority to determine the effective date of the policy and bind the company thereby. The factors which determined the defendant's liability in those cases are absent here. Where the applicant had notice, as in the present case, of the limitations on the agent's authority and of the effective date of the policy, it has been held that the insurer was not bound by any oral representation of an earlier effective date. *Harris v. Mutual Ben. Health & Ac-*

*cident Ass'n*, 187 Ark. 1038, 63 S.W.2d 975, *Rainsbarger v. Mutual Ben. Health & Accident Ass'n*, 227 Iowa 1076, 289 N.W. 908. In the case last cited a policy was issued under agreements and circumstances very similar to those in the present case, and a judgment dismissing the plaintiff's petition was affirmed. There are no facts here presented which would justify a finding of negligence, waiver, or estoppel on the part of the insurer. Delay alone is not sufficient to create a contract of insurance. *Lucas v. Metropolitan Life Ins. Co.*, 14 Cal.App. 2d 676, 680, 58 P.2d 934, citing cases. Considering the geographical distances here involved, no more than a reasonable time elapsed between the date of the applications and the issuance of the policies. Neither the retention of the premium until return was tendered at the trial, nor the issuance of the policies after notice of the accidents, sufficed to impose liability prior to the date of the policies, in view of the statement in the applications that liability would not attach until the policies issued. The insured or the beneficiary could not have been misled by any act of the association.

Our conclusion is that the trial court correctly decided that the plaintiff was not entitled to recover on the contracts of insurance issued by the defendant.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concurred.

CARTER, Justice.

I dissent. The majority opinion is based primarily upon the proposition that the agent who solicited the insurance had no authority to fix the date at which the risk was assumed by the insured. Conceding that to be true, there still exists a logical basis upon which the liability of the insurer must be predicated. That basis is ignored by the majority opinion. The facts of the case are clear.

Plaintiff's husband, now deceased, was on July 17, 1940, solicited by a Mr. Abraham, soliciting agent of the defendant insurance company, for two health and accident insurance policies paying death benefits. Applications for the policies were signed by decedent at that time and he paid to Abraham \$13 on account of the premium on each of the policies. Abraham dated the applications July 20, 1940, cashed the check, and on that date delivered the applications

and the premium money, less his commission, to the Mutual Insurance Agency which was in charge of Mr. Hall, who was the general agent for defendant in Los Angeles, California, and authorized to accept premiums and applications. Defendant's Home Office is in Omaha, Nebraska. The list of the applications received by Hall, including that of decedent, was dated July 30, 1940, and was received at the defendant's Home Office on August 2, 1940. The policies were issued on August 5, 1940, and delivered on August 6, 1940. Decedent was unconscious when the policies were delivered. The policies were issued solely upon the information set forth in the application.

On July 26, 1940, decedent suffered an injury as the result of a fall and on July 30 was again injured from a fall. He died on August 6, 1940, from the latter injury. On July 30, 1940, decedent's wife wrote to Hall, defendant's general agent, advising of the injuries, and asked for claim blanks. The letter was received by Hall on August 2, 1940. Blanks were sent to her.

The applications on the face thereof contain among other things the following: "I, the undersigned hereby make application to \* \* \* (defendant), for policy \* \* \*, I understand and agree that this application shall not be binding upon the Association until the policy is issued to me." And also: "Do you hereby apply to \* \* \* (defendant) for a policy issued solely and entirely in reliance upon the written answers to the foregoing questions, and do you agree that (defendant) is not bound by any statement made by or to any agent unless written herein? Yes." On the back of the application was advertising matter which included the following: "No Medical Examination Necessary" and "Insurance Policy. This policy goes into immediate effect from date of issue on accident and on sickness as plainly stated in the policy."

The policies stated that the benefits would be paid for loss of life resulting from an injury received during the term of the policy. The term of the policy was stated as commencing on August 5, 1940.

This action was commenced by plaintiff to reform the policies and recover the death benefits thereunder. Judgment was rendered for defendant and plaintiff appeals.

The established rules for the construction of insurance contracts must be kept in

mind. Because contracts of insurance are not the result of negotiation, and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured. *Blackburn v. Home Life Ins. Co.*, 19 Cal. 2d 226, 120 P.2d 31; *Perkins v. Fireman's Fund Indemnity Co.*, 44 Cal.App.2d 427, 112 P.2d 670. Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the insured will prevail. *Fageol T. & C. Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 117 P.2d 661.

From the foregoing facts it is clear that the contracts of insurance were consummated. The applications were sent to defendant at its Home Office in Omaha, Nebraska. The premium was paid. They were there approved. Policies were issued on August 5, 1940. That the contract was complete and binding upon the insurer under those circumstances cannot be doubted. (See 14 Cal.Jur. 425, 426.) Hence, the main issue is, when under the insurance contract the risk was assumed by the insurer; that is, did it commence at the date of the policies or prior thereto.

Applications for insurance have been referred to as offers or proposals for insurance on the part of the one to be insured. (14 Cal.Jur. 422.) The application becomes a part of the contract of insurance when the policy expressly so provides. *Boyer v. United States F. & G. Co.*, 206 Cal. 273, 274 P. 57. In the instant case the applications were by the policies expressly made a part thereof, and photostatic copies were affixed thereto.

Turning therefore to the applications, it appears that they do not expressly state when the insurance coverage was to commence. They do provide that decedent applies to defendant for certain designated policies, and at the end of each appears the notation "Total cost \$39.50." Under that figure are the words "First Year." Thereafter it reads "Paid \$13 Balance \$26.50 (Payable 30-60 days) Date 7/20/1940—." The signature of the decedent applicant and the soliciting agent follow. The applications were signed on July 17, 1940; the date, July 20, 1940, was inserted therein by the soliciting agent, it being the time when he delivered the applications to Hall. A portion of the premium was paid on July 17, 1940, and according to the applications the balance



could be paid on a time basis. It is a fair and reasonable inference from the foregoing that applications were being made for insurance for a year's term to commence upon July 17, 1940, if the insurer chose to accept the application and issue the policies. That it did so choose is apparent from the issuance of the policies. That interpretation clearly follows from the rule that "Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail." *Fageol T. & C. Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 747, 117 P.2d 661, 669. Of course, an insurer can accept or reject an application for insurance, the same as any other person to whom an offer is made. But as will presently appear, the real question involved is, what was actually done in the light of the proper construction of the documents in the case now before us.

It is urged that the foregoing construction is not permissible because of the above-quoted clause in the application that the application shall not be binding upon the insurer until the policy is issued. On the contrary that clause lends support to that construction. It is to be noted that the application is not to be binding until a policy is issued. The reasonable and fair interpretation of that clause is that the application shall not constitute a contract of insurance, or that there shall be no insurance in effect pending the application unless the policy is issued. As we have seen, the application is merely an offer or proposal, and it would not create a binding contract of insurance. But that does not mean that when the offer is accepted it would not cover risks as of the date that the application was made for insurance.

With respect to the notation on the back of the applications heretofore mentioned, suffice it to say that it was no part of the application and cannot be said to be binding upon decedent. The matter appearing upon the face of the application should control.

Each policy of insurance provides that it is issued in consideration of the statements made in the application and the payment of the premium, and that its term begins on the date thereof. It bears date of August 5, 1940. While it is true that the naming of August 5, 1940, as the date of the commencement of the term in the policy would appear to be an insufficient

acceptance of the offer to purchase on the application for insurance as presented, inasmuch as such offer should be interpreted as requesting that the insurance commence on July 17, 1940, and therefore that no contract existed, the policy being merely a counter offer or proposal, we do not believe the policy may be so construed. The application was made a part of the contract of insurance and properly interpreted, contemplates that the risk was assumed as of July 17, 1940. This reasoning is further fortified by the fact that the policy was given in consideration of the statements in the application and the premium. The premium was paid. There is therefore an ambiguity on the face of the policy with reference to the effective date of the insurance coverage. Such ambiguity must be construed against the insurer in the light of the foregoing rules of construction. The result is that the application controls, and the issuance of the policy was a sufficient acceptance of the application as correctly interpreted, and a contract was consummated giving protection from July 17, 1940. Assuming that the contract of insurance did not become a completed contract until it was issued and delivered on August 6, 1940, nevertheless the period during which the risk was assumed related back to July 17, 1940. It follows therefore that the injuries suffered by decedent which resulted in his death, having occurred after the effective date of the policies, the death benefits are payable thereunder.

The cases relied upon by defendant are not in point. The same factual situation was not involved in *Burch v. Hartford Fire Ins. Co.*, 85 Cal.App. 542, 543, 259 P. 1108. In *Hansen v. Farmers' Auto. Inter-Insurance Exchange*, 139 Cal.App. 388, 34 P.2d 188, no policy was ever issued upon the application, and it is otherwise distinguishable in respect to the wording of the application. The same comment applies to *Lucas v. Metropolitan Life Ins. Co.*, 14 Cal.App.2d 676, 58 P.2d 934, *Stark v. Pioneer Casualty Co.*, 139 Cal.App. 577, 34 P.2d 731, and *Toth v. Metropolitan Life Ins. Co.*, 123 Cal.App.185, 11 P.2d 94.

It may be that a cursory reading of the application would lead one to the conclusion reached in the majority opinion that no ambiguity exists as to the effective date of the policy. However, the application states "I understand and agree that this application shall not be binding upon the

association until the policy is issued to me." The clear implication and inference to be drawn from this statement is that, if and when the policy is issued, the "application" is "binding." The premium was paid and the policy was issued. It is conceded by the defendant that the policy could have been dated any day on or after the date the application was made. Since the application constitutes an offer and the issuance of a policy constitutes the acceptance, the obligation created by the offer and acceptance relates back to the date of the offer in the absence of an express agreement to the contrary. There was no express agreement in this case. Therefore, upon the issuance of the policy, the liability of the insurance company became effective as of July 17, 1940, the date the application was made.

Even if the application is susceptible of a different interpretation, under the rule announced in the Fageol case above cited, *the interpretation which affords the greatest measure of protection to the assured should prevail.* This rule is nullified by the majority decision in this case.

In my opinion the judgment should be reversed.

CURTIS, J., and PETERS, J. pro tem,  
concurring.

Rehearing denied; CURTIS, CARTER,  
and SCHAUER, JJ., dissenting.



22 Cal.2d 256

**PHILLIPS v. SUPERIOR COURT OF  
KERN COUNTY.**

**S. F. 16880.**

Supreme Court of California.

May 21, 1943.

**1. Contempt ☞67**

Since no appeal lies from an order made in a contempt proceeding, it may be reviewed upon certiorari if it is in excess of jurisdiction. Code Civ.Proc. § 1222.

**2. Contempt ☞54(4)**

A "contempt proceeding" is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action, so that no indentments may be indulged in to aid the sufficiency of the affidavit as basis of proceeding to punish for constructive contempt. Code Civ.Proc. § 1211.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt Proceeding".

**3. Contempt ☞54(4)**

An affidavit as basis for a constructive contempt proceeding is fatally defective if it fails to allege that the accused had notice or knowledge of the existence of the order at the time he is claimed to have violated it, although a statement that he was present in court when the order was made sufficiently charges knowledge of its terms. Code Civ.Proc. § 1211.

**4. Divorce ☞305**

Where order finding wife guilty of constructive contempt for violating divorce decree giving grandmother control of child was based upon affidavit including no allegation that wife was served with notice of divorce decree, that she had actual knowledge of its terms, or that she was present in court when it was made, proceeding was void ab initio notwithstanding that wife's statement in affidavit filed in contempt proceeding implied knowledge of the terms of the divorce decree, or fact that wife was a party to divorce action. Code Civ.Proc. § 1211.

**5. Contempt ☞23**

The fact that one is a party to litigation does not of itself charge him with knowledge of an order or judgment made in connection with the litigation so as to afford basis for contempt proceeding.

**6. Contempt ☞54(5)**

The absence of essential facts, the existence of which are necessary to be shown in the affidavit required by statute relating to constructive contempts as a condition precedent to the exercise of jurisdiction to proceed in contempt, cannot be cured by proof upon the hearing. Code Civ.Proc. § 1211.

In Bank.

Proceedings by Bertrice Phillips against the Superior Court of the County of Kern

to review an order of that court adjudging her guilty of contempt.

Order annulled.

Fabian D. Brown, of San Francisco, for petitioner.

W. C. Dorris and C. Fleharty, Jr., both of Bakersfield, for respondent.

EDMONDS, Justice.

After the respondent made an order adjudging her guilty of contempt, Bertrice Phillips petitioned for and obtained from this court a writ of review. In response to the writ, the record of the proceeding has been filed, and also an answer alleging facts in support of the jurisdiction to make the challenged order.

The controversy has arisen over the custody of a minor child. In 1941, the Superior Court of Kern County granted the petitioner an interlocutory decree of divorce upon her cross-complaint. By the terms of the decree, which conformed to an agreement made by her and her husband, the custody of the minor child was awarded to the wife. However, the decree also provided that Mary Phillips, the child's grandmother, should have her "immediate care and control." Upon an affidavit of Mary Phillips asserting that the petitioner "has the child in her custody" in violation of the terms of the decree, the court issued an order directing her to show cause why she should not be punished for contempt. On the day set for the hearing, counsel for Bertrice Phillips requested a continuance for one week to permit her to appear in person. The motion was denied and the court adjudged her guilty. Service of a warrant for her arrest has been stayed by the writ of review.

[1] The petitioner asserts that the affidavit upon which the order to show cause issued is fatally defective in that it does not state any facts showing that she had knowledge of the order she is charged with violating. Under such circumstances, she asserts, the court is without jurisdiction to act in the matter. The respondent does not question the rule that because there is no appeal from an order made in a contempt proceeding, it may be reviewed upon certiorari if it is in excess of jurisdiction. Code Civ.Proc., sec. 1222; *Taylor v. Superior Court*, 20 Cal.2d 244, 246, 125 P.2d 1; *Commercial Bank of Spanish America v. Superior Court*, 192 Cal. 395, 220 P. 422;

*Tripp v. Tripp*, 190 Cal. 201, 211 P. 225. But, in support of the order, it points to the recital in the affidavit that the petitioner was the defendant and cross-complainant in the divorce action, as the equivalent of charging the petitioner with being present when the decree of divorce was rendered. Moreover, says the respondent, the decree of divorce was granted to the petitioner upon her cross-complaint.

[2,3] A contempt proceeding is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action. *Ex parte Morris*, 194 Cal. 63, 227 P. 914; *Ex parte Gould*, 99 Cal. 360, 33 P. 1112, 21 L.R.A. 751, 37 Am.St.Rep. 57. Accordingly, no intendments or presumptions may be indulged in to aid the sufficiency of the affidavit required by section 1211 of the Code of Civil Procedure as the basis of a proceeding to punish for constructive contempt. Such an affidavit is fatally defective if it fails to allege that the accused had notice or knowledge of the existence of the order at the time he is claimed to have violated it. *Frowley v. Superior Court*, 158 Cal. 220, 110 P. 817; *Hedges v. Superior Court*, 67 Cal. 405, 7 P. 767; *Mitchell v. Superior Court*, 163 Cal. 423, 125 P. 1061; *In re Ellery*, 22 Cal.App.2d 274, 70 P.2d 690. Ordinarily, it is averred that the alleged contemnor was served with a copy of the court's order and subsequently violated it although a statement that he was present in court when the order was made sufficiently charges knowledge of its terms. (*Mitchell v. Superior Court*, supra.)

[4-6] The affidavit of Mary Phillips includes no allegation that the petitioner was served with notice of the order, that she had actual knowledge of its terms, or that she was present in court when it was made. The fact that one is a party to litigation does not, of itself, charge him with knowledge of an order or judgment made in connection with it. *N. Y. K. Oil Co. v. Superior Court*, 11 Cal.App.2d 607, 54 P.2d 80. Nor may the statements in the affidavit of Bertrice Phillips filed in the contempt proceeding supply the deficiencies of the affidavit upon which the order finding her guilty was made. In response to the order to show cause, she admitted taking her daughter from Mary Phillips after advising the grandmother by letter that "I would take the child for three weeks be-



cause I had not seen the child for some months." Assuming that her explanation implies knowledge of the terms of the divorce decree, it did not authorize the court to proceed against her. "It is settled law \* \* \* that \* \* \* the absence of essential facts, the existence of which are necessary to be shown in the affidavit as a condition precedent to the exercise of jurisdiction to proceed in contempt, cannot be cured by proof upon the hearing. Having failed to acquire jurisdiction, the court had no authority to proceed to a hearing at all." *Frowley v. Superior Court*, supra. Under such circumstances the proceeding is void ab initio. *Ex parte Von Gerzabek*, 63 Cal.App. 657, 219 P. 479.

Insofar as the cases of *Ex parte Grigoris*, 99 Cal.App. 455, 278 P. 873, and *Mattos v. Superior Court*, 30 Cal.App.2d 641, 86 P.2d 1056, are contrary to these conclusions, they are disapproved.

The order is annulled.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.



59 Cal.App.2d 59

PEOPLE v. SALTER et al.

Cr. 3637.

District Court of Appeal, Second District,  
Division 1, California.

June 3, 1943.

Hearing Denied July 1, 1943.

#### 1. Criminal law ☞1171(1)

Courts are strongly inclined against setting aside convictions upon the ground of misconduct of district attorneys alone, and such misconduct is not ground for reversal when it is unimportant or when it cannot prejudice accused or when it appears that the verdict could not have been affected by it.

#### 2. Criminal law ☞1171(1)

A conviction will not be reversed because of misconduct of the district attorney

except in clear and extreme cases and unless the misconduct is flagrant and obviously prejudicial and unless in the opinion of the appellate court from a review of the entire record, such misconduct results in a miscarriage of justice.

#### 3. Criminal law ☞1171(1)

Conduct of district attorney must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in a criminal case before error can be predicated upon it, and there must be willful error persisted in for an illegitimate purpose followed by injustice to the prisoner.

#### 4. Criminal law ☞1171(3)

Deputy district attorney's argument concerning testimony of accomplice witness that attorney was vouching for witness' integrity was not prejudicial "misconduct" as giving excessive weight to witness' testimony where attorney did not express an opinion regarding accused's guilt or an opinion based on independent knowledge or facts outside the record, and made no statement that he knew witness or had talked to him. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

#### 5. Criminal law ☞742(1)

The jury is the sole judge of a witness' credibility.

#### 6. Criminal law ☞742(2)

In prosecution for kidnapping for the purpose of robbery, robbery, assault with a deadly weapon, and attempted robbery, whether people's witness who was accused's accomplice, and who allegedly was of base character was worthy of credence was for jury.

#### 7. Kidnapping ☞5 Robbery ☞24(1)

Evidence sustained convictions of kidnapping for the purpose of robbery, robbery and attempted robbery.

#### 8. Criminal law ☞511(1)

Evidence sufficiently corroborated testimony of accomplice as to accused's participation in kidnapping for the purpose of robbery, robbery and attempted robbery. Pen.Code, § 1111.

9. Criminal law ⚡741(1)

Jury was entitled to accept witness' testimony notwithstanding its alleged weakness.

10. Kidnapping ⚡3

Robbery ⚡15

Where kidnapping, robbery and attempted robbery were within the scope of a conspiracy to commit robberies and burglaries, accused was bound by the acts of his coconspirators, notwithstanding his absence during their commission.

11. Kidnapping ⚡1

A moving or carrying away of the victim is not necessary to constitute "kidnapping", but seizing an individual or restraining him through fear is kidnapping.

See Words and Phrases, Permanent Edition, for all other definitions of "Kidnapping".

Appeals from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Cecil H. Salter and another were convicted of kidnapping for the purpose of robbery, robbery, and attempted robbery, and they appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellant Homotoff.

David L. Sefman, of Los Angeles, for appellant Salter.

Robert W. Kenny, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., Fred N. Howser, Dist. Atty. of Los Angeles County, of Long Beach, and Clifford Crail, Deputy Dist. Atty., of Los Angeles, for respondent.

YORK, Presiding Justice.

By an information, appellants were charged jointly in three counts with kidnapping for the purpose of robbing Mr. and Mrs. Sherman and Mrs. Whitehouse, respectively; in the fourth count with robbing Mrs. Sherman of a diamond ring; in the fifth count with assaulting Mr. Ide with a deadly weapon, and in the sixth count with attempted robbery of Mr. Ide. In addition, each appellant was charged with a prior conviction, which they first denied and then admitted. During the trial, the fifth count was dismissed as to both appellants upon motion of the prosecution.

Appellant Homotoff appeals from the judgments of conviction of the offenses, as charged in the information, and from the order denying his motion for a new trial. Appellant Salter appeals only from the judgments of conviction.

Although appellants have filed separate briefs, appellant Salter's brief adopts the statements contained in appellant Homotoff's brief, adding thereto the assertion that the evidence produced against him is insufficient to establish the kidnapping of Mr. and Mrs. Sherman and Mrs. Whitehouse of which both appellants were found guilty.

It is here contended that the prosecutor committed prejudicial misconduct; that the verdicts were against the law and the evidence; that the evidence was insufficient to support the verdicts, and that the evidence attempting to connect appellants with the crimes charged was unsubstantial and insufficient.

Around 8 o'clock in the evening of July 23, 1941, Wesley M. Sherman, who was employed as a bookkeeper by Motor Discount Company, 1717 South Figueroa Street, Los Angeles, left the office of said company and drove his automobile to his home at 380 Dearborn Street, Pasadena, where he resided with his minor son, his wife, and the latter's mother, Mrs. Louise Whitehouse.

It appears that appellants and one Arthur Toube, who jointly had been engaged in a course of criminal conduct, including the commission of the crimes of burglary and robbery, had been watching the office of the Motor Discount Company and for some time had been shadowing Mr. Sherman in the belief that he had money in his house belonging to this company.

On the evening in question, with Toube driving the car in which appellants were riding, they saw Mr. Sherman coming out of a driveway in his automobile in the vicinity of Motor Discount Company's office on South Figueroa Street, and at appellant Salter's suggestion, they followed Mr. Sherman's car and stopped approximately one-half block from the Sherman residence. Toube remained in the car and appellant got out and ran down the driveway into Mr. Sherman's yard.

When Mr. Sherman attempted to leave his garage, after parking his car, he was accosted by one of the appellants who

was armed with a gun which he pointed at Sherman's stomach. This man ordered Sherman "to get in the car and keep quiet \* \* \* this is a holdup", to which Sherman replied he would do anything the man wanted if he would not harm his family. Mrs. Sherman and their minor son were then inside the house. About this time the second appellant stepped up, also armed with a gun, and both men insisted that Sherman "go get the money" for them, while he kept reiterating that he did not have any money. Meanwhile, Mrs. Whitehouse (Mr. Sherman's mother-in-law) returning from a drugstore where she had been on an errand, walked into the driveway and approached the group. The two armed men immediately "covered" her with their guns and informed her it was a "holdup", and at this juncture Toube joined the group, having remained in his car in front of the house up to this point. Mrs. Whitehouse was ordered into Mr. Sherman's car by one of appellants, whereupon both appellants accompanied Mr. Sherman into his house, where they encountered Mrs. Sherman in the bedroom. Appellant Salter ordered her to get out of bed and appellants then took from her the sum of \$2.85 which she had in her purse. After appellants were told repeatedly that Mr. Sherman had no money, they ordered the Shermans to go into the kitchen, where appellant Salter quizzed them about the combination to the Motor Discount Company's safe. After they were told that Mr. Sherman did not have the combination to the safe, the appellants ordered the Shermans to go out and get in their car, which they did, joining Mrs. Whitehouse who was seated therein and who was being guarded by Arthur Toube, as he had been directed to do by appellant Salter. After a conference between Toube and appellants, it was decided that appellant Homotoff should stay in the kitchen of the house and guard Mrs. Whitehouse until he was notified by telephone that the criminal enterprise was completed; and that the Shermans should accompany Toube and appellant Salter, Toube driving the Sherman car, to the home of Corson Ide, president of the Motor Discount Company. Mr. Sherman did not know where Mr. Ide lived, but Mrs. Sherman stated: "If you will let my mother stay at home, I will direct you to Mr. Ide's house."

When they reached the Ide house, Mr. Sherman was ordered by appellant Salter

to get out of the car and accompany him, and Toube was told to guard Mrs. Sherman in their absence. Mr. Ide was not at home, but it was ascertained from a member of his household that he was playing bridge at the home of a neighbor. Appellant Salter returned with Mr. Sherman to the car and they proceeded to the home of Dr. Parker, whereupon appellant Salter directed Mr. Sherman to leave the car and accompany him to the Parker house. Mr. Ide was called to the front door by Mr. Sherman. Meanwhile, appellant Salter was hiding behind bushes near the door, covering Mr. Sherman with his gun. When Mr. Ide appeared at the door, Mr. Sherman attempted to persuade him to accompany him to the company's office in Los Angeles. This Mr. Ide refused to do, but he was finally induced to walk out to the car with Mr. Sherman, being unaware of the presence of appellant Salter. However, as Mr. Ide took a few steps across the porch from the door, appellant Salter confronted him with the gun and endeavored to force him into the automobile. This attempt was frustrated by Mr. Ide, who suddenly turned and dashed back into the house. Appellant Salter then made a "grab" for Mr. Sherman, who escaped him, whereupon appellant Salter ran to the car, took the driver's seat and drove away with Toube sitting beside him and Mrs. Sherman restrained in the back seat. After encountering some difficulty in finding their way out of Pasadena, the car was stopped near a service station where Toube left the car and telephoned to Homotoff instructing him to leave the Sherman residence. The car was then driven onto the Freeway between Pasadena and Los Angeles on the wrong side thereof at approximately 80 miles per hour. Somewhere near Los Angeles, Mrs. Sherman was robbed of her diamond ring and then released. This ring was later given by appellant Salter to Virginia Ballard, an acquaintance. During the absence of Toube, appellant Salter, and the Shermans, Mrs. Whitehouse was detained and guarded in the kitchen of the Sherman home by appellant Homotoff, who released her and left the house after receiving the telephone call from Toube.

The appellants urge that the deputy district attorney committed prejudicial misconduct when, in his argument to the jury at the close of the case, he made the following remarks concerning the testimony of



the witness Arthur Toube, an admitted accomplice: "If there is any testimony that will assist the jury in arriving at the truth in a situation of this kind, I am going to bring it into court, because I don't want you folks to speculate. I want you folks to be convinced, and you can only be convinced when I have brought you all of the evidence that is available. Certainly I brought Mr. Toube in, and I am vouching for Mr. Toube's integrity. \* \* \* If I didn't think that Arthur Toube was telling the truth, or that he didn't intend to tell you the truth, I wouldn't have put him on the witness stand. \* \* \* I didn't have to bring Arthur Toube in here—Mr. Lavine is right—but I have brought him in here. And when I bring him in here I write my endorsement on his testimony, that he is telling you the truth, just as I do the testimony of any other witness."

[1-3] Appellants contend that "the effect of the prosecutor's statement was to give the testimony of the accomplice greater weight than to that of an ordinary witness, in violation of the provisions of section 1111 of the Penal Code \* \* \*".

"Courts are strongly inclined against setting aside convictions upon the ground of misconduct of district attorneys alone. Such misconduct, therefore, is not ground for a reversal when it is unimportant, or slight, or when it cannot prejudice the defendant, or when it appears that the verdict could not have been controlled or affected by it, as where the evidence is such that it is inconceivable that any honest jury could have found any other verdict in the absence of any dereliction on the part of the district attorney. A judgment will not be reversed because of the misconduct of the district attorney except in clear and extreme cases, and unless the misconduct is flagrant and obviously prejudicial, and unless, in the opinion of the appellate court from a review of the entire record, it results in a miscarriage of justice. Counsel's conduct must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in a criminal case before error can be predicated upon it. There must be willful error persisted in for an illegitimate purpose, followed by injustice to the prisoner." (8 Cal.Jur. 621, 622, sec. 602, and authorities there cited.) See, also, *People v. Kennedy*, 21 Cal.App. 2d 185, 207, 69 P.2d 224.

In the case of *People v. Cowan*, 38 Cal. App.2d 231, 246, 101 P.2d 125, 134, the deputy district attorney in his opening argument when discussing the credibility of one Malter, his most important witness, stated: "I take this responsibility and say unto you, that we are not putting on that kind of a man before you and asking you to believe that that we do not believe ourselves, that we are not absolutely convinced of, and I will tell you that I am saturated with the confidence and the knowledge that Morris Malter has told you the truth about what this conspiracy was about." It was there held: "It should be admitted that the [district] attorney should not have stated that he had knowledge that Malter was telling the truth. Otherwise the statement is nothing more than a summary of what should be common knowledge of the ethics to be used by a reputable prosecutor. No such official should attempt to convict defendants on evidence that he does not believe to be true. This portion of the argument was innocuous and could not be regarded as prejudicial. The insertion of the single word 'knowledge' into what was otherwise a harmless argument hardly had sufficient emphasis, when taken with the context, to mislead the jury, especially in view of the many and often-repeated instructions to the jury that they could not consider any statement of counsel as evidence nor give it any weight as such."

[4] At no time during the trial in the instant case did the prosecutor express an opinion regarding the guilt or innocence of appellants, nor did he express an opinion based on independent knowledge or facts outside the record. There was no statement that he knew the witness Toube or had ever talked to him. Under the circumstances, it cannot be said that the statements objected to were so prejudicial to the cause of appellants as to warrant a reversal of the judgments.

Appellants urge that the testimony of the witness Toube should be disregarded because of his base character and furthermore that his evidence, concerning appellant Homotoff's participation in the offenses charged against him, was uncorroborated.

[5,6] The jury is the sole judge of the credibility of a witness. *People v. Connelly*, 195 Cal. 584, 593, 234 P. 374. In that case a similar argument was advanced, that is, that the witnesses for the People were

ex-convicts and law violators. The court held that the jury and the jury alone could decide whether such witnesses were worthy of credence, and the jury having made the decision it is final.

[7,9] In the instant case, the evidence of appellants' guilt of the crimes of which they stand convicted is conclusive, and the testimony of the witness Toube was sufficiently corroborated as required by section 1111 of the Penal Code, for the reason that both Mr. and Mrs. Sherman identified appellant Salter as one of the perpetrators of the crime against them, and Mrs. Whitehouse positively identified appellant Homotoff as the man who held her captive while the robberies and other kidnappings were being perpetrated. Mrs. Whitehouse's identification was based upon her observation of appellant Homotoff in a lighted room where the fluorescent tube light over the stove "lit up the whole kitchen", when she pulled off his hat so that she could see him. Appellants complain that the testimony of Mrs. Whitehouse is weak because she was unable to see alleged scars on appellant Homotoff's face when he stood a distance of from three to four feet from her in the lighted courtroom. However, the jury was satisfied with the witness' intelligence, age and vision and accepted her story as it had a right to do in finding appellant Homotoff guilty. It is also urged by appellants that Mrs. Whitehouse was not kidnapped. She testified that she was ordered into the car by these men and also ordered into the house by them, and that she complied because they were armed. This is sufficient evidence from which the jury might infer that she was acting under duress and force. See *People v. Tanner*, 3 Cal.2d 279, 44 P.2d 324.

The facts adduced at the trial herein establish that a general conspiracy existed

between appellants Salter and Homotoff and the witness Toube to commit robberies and burglaries, and that the crimes committed by these three men on July 23, 1941 were in furtherance of such conspiracy.

[10,11] Mrs. Sherman testified that Salter, Homotoff and Toube made their plans as to the manner in which the robbery should be carried out in the presence of herself, her husband and her mother; that Salter and Toube should take her and her husband with them to get the combination of the safe from Mr. Ide, and that they should leave Homotoff to guard her mother, Mrs. Whitehouse, in their absence. The kidnapping and robbery of Mr. and Mrs. Sherman and the attempted robbery of Mr. Ide were within the scope of the conspiracy, and appellant Homotoff is bound by the acts of his co-conspirators. It is not necessary that there be a moving or carrying away of the victim in order to constitute the crime of kidnapping. The act of seizing an individual or restraining him through fear is as much a violation of the law of kidnapping as if he were carried away and concealed. *People v. Tanner*, 3 Cal.2d 279, 295, 297, 44 P.2d 324; *People v. Raicho*, 8 Cal.App.2d 655, 665, 47 P.2d 1108. The Shermans and Mrs. Whitehouse were seized and confined before the departure of the Shermans from their home, all in the presence of appellant Homotoff.

An examination of the entire record herein shows sufficient substantial evidence to support the judgments of conviction, and that the errors committed during the trial were not sufficiently prejudicial to require a reversal of the judgments.

The judgments and order appealed from are affirmed.

DORAN and WHITE, JJ., concur.

58 Cal.App.2d 848

**SMITH et al. v. ORANGE BELT  
SUPPLY CO.**

**Chv. 3076.**

**District Court of Appeal, Fourth District,  
California.**

**May 27, 1943.**

**Hearing Denied July 22, 1943.**

**I. Appeal and error ⇐977(3)**

**New trial ⇐93**

The granting of new trial on death of stenographic reporter before transcript of testimony for purpose of appeal has been completed is within discretion of trial court, and its action thereon will not be disturbed unless abuse of discretion clearly appears. Code Civ.Proc. §§ 953a, 953e.

**2. New trial ⇐93**

Where stenographic reporter died after completing small portion of transcript of testimony on showing that trial attorneys were not available for preparation of appeal record and substituted attorney had insufficient knowledge of facts, in absence of effort to indicate any errors of law or to show likelihood of different result in event of retrial, refusal to grant new trial was not abuse of discretion.

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Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by J. L. Smith and Evelyn B. Smith against Orange Belt Supply Company. Judgment was for plaintiffs, and defendant sought to appeal. Before transcript was completed, the stenographic reporter died. From an order denying defendant's motion for new trial, defendant appeals.

Affirmed.

E. I. Feemster, of Visalia, for appellant.

McFadzean & Crowe, of Visalia, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for the new trial authorized by section 953e of the Code of Civil Procedure.

A judgment in favor of the plaintiffs was entered on February 20, 1942, the action having been tried by the court without a jury. On April 13, 1942, present counsel

was substituted in place of another who had theretofore acted as attorney for the defendant. On April 14, 1942, notice of appeal from the judgment was filed with a request for a transcript as provided for in section 953a, Code of Civil Procedure. On May 11, 1942, and before his transcript had been completed, the stenographic reporter died. Thereafter, a motion for a new trial based upon the impossibility of obtaining a transcript was made and denied by the court. This appeal followed.

[1] It seems to be settled that the granting of a new trial upon this ground is a matter resting in the sound discretion of the trial court, that it is vested with a wide discretion in passing on such an application, and that its action thereon will not be disturbed unless an abuse of this discretion clearly appears. *Moore v. Specialty Oil Tool Co.*, 128 Cal.App. 662, 18 P.2d 82; *Conlin v. Coyne*, 19 Cal.App.2d 78, 64 P.2d 1123; *Kroeker v. Jack*, 51 Cal. App.2d 272, 124 P.2d 619. In the first of these cases, in holding that no abuse of discretion was disclosed by the record, it was pointed out that there was nothing to indicate that the evidence would be any different on a new trial or that a different result might be anticipated. It was further pointed out that the fact that the denial of such motion might deprive an appellant, through no fault of his own, of the opportunity of obtaining a review of a judgment against him is not, in itself, a sufficient ground for reversing the order denying a new trial. In *Conlin v. Coyne*, supra, in holding that no abuse of discretion appeared in the denial of such a motion it was pointed out that no effort had been made to prepare a bill of exceptions, that it was not sufficiently shown that such a record could not have been prepared, and that while a portion of the reporter's transcript had been written up and was available there was no showing as to the materiality of the missing portions. In *Kroeker v. Jack*, supra, the main showing in support of the motion for such a new trial was that the attorneys for the appellants lacked sufficient memory with respect to the testimony and other matters to enable them to prepare a bill of exceptions. In holding that no abuse of discretion appeared, it was pointed out that no effort had been made to indicate any errors of law or to show any likelihood of a different result in the event of a retrial.



In the instant case two affidavits were introduced in support of the motion. One of these is to the effect that other reporters are unable to transcribe the shorthand notes of the deceased reporter. The other is an affidavit by appellant's present counsel in which he states, so far as material here, that he had no knowledge of any of the facts or proceedings involved in this action prior to April 13, 1942, that appellant's original counsel has been so busily engaged in other duties that he is unable to give, and is not available for, any assistance to the affiant in the preparation of a record; that the stenographic reporter at the time of his death had prepared about 66 folios of the transcript, which covered the testimony of two witnesses for the respondents and a small portion of the testimony of a third; that the testimony of eight other witnesses for the respondents and five witnesses for the appellant had not been transcribed and it is now impossible to have the same transcribed; that he is informed and believes that the testimony of the appellant's witnesses was technical and expert in character and showed that the work done by the appellant was properly performed; that the appellant, in its appeal from the judgment, relies upon the insufficiency of the evidence; that without a complete transcript of the evidence it is impossible for appellant to point out or explain the particulars in which the evidence is insufficient; that counsel for respondents had stated to affiant that it would be impossible to agree upon a statement of the facts or to have a bill of exceptions settled or agreed upon; and that it is impossible, without the requested transcript, to prepare and have settled a bill of exceptions. No opposing evidence appears in the record but in respondents' brief it is asserted that the statements in the last-mentioned affidavit, concerning a conversation with counsel for the respondents, were vigorously denied at the hearing.

In principle, we are unable to distinguish this case from the cases above cited. There would seem to be little distinction between a situation where a bill of exceptions cannot be prepared without a transcript because counsel has forgotten the facts and one where, due to a substitution of attorneys, counsel has no sufficient knowledge of the facts. To recognize the latter as sufficient to require the granting of a new trial would lead to a result not contemplated by the statute.

[2] It might well be that the 66 folios of testimony which had been transcribed contained evidence sufficient to support the judgment, in which event the untranscribed testimony could only raise a conflict. Nothing is said in the affidavit concerning the nature of the testimony which had been transcribed, and there is no attempt to show that the evidence was in fact insufficient to support the judgment. While the affidavit alleges that the former counsel for appellant "is not available" for any assistance in the preparation of a record, the showing that no such assistance could have been had by timely effort is not too strong.

While the showing made might well have justified the granting of a new trial it falls short, in our opinion, of being sufficient to clearly disclose an abuse of the discretion which was vested in the trial court and, under such circumstances, the order of the court may not be disturbed on appeal.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 900

**PEOPLE v. JONES,**  
Cr. 3702.

District Court of Appeals, Second District,  
Division 2, California.  
May 26, 1943.

#### Criminal law §1182

Where defendant filed no brief on appeal and on return date of order to show cause why appeal should not be dismissed for want of prosecution there was no appearance on behalf of defendant by brief or otherwise, judgment was affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceeding by the People, etc., against Harold Jones. From an adverse judgment, defendant appeals.

Affirmed.

Harold Jones, in pro per.

Robert W. Kenny, Atty. Gen., for respondent.

### PER CURIAM.

The transcripts on appeal were filed in this court April 1, 1943. No brief having been filed, an order to show cause why the appeal should not be dismissed for want of prosecution was issued April 30, 1943, returnable May 26, 1943. On the latter date there was no appearance on behalf of appellant, by brief or otherwise. Pursuant to the provisions of section 1253 of the Penal Code, the judgment of the trial court is affirmed.



58 Cal.App.2d 888

### PACIFIC TELEPHONE & TELEGRAPH CO. v. CITY OF LODI.

Civ. 12434.

District Court of Appeal, First District,  
Division 2, California.

May 28, 1943.

Hearing Denied July 26, 1943.

#### 1. Contracts ⇐154

Provision of contract which is not clear should if possible be given such interpretation as will make provision operative and reasonable, and which will not involve an absurdity. Civ.Code, §§ 1638, 1643.

#### 2. Contracts ⇐143

Under statute relating to interpretation of contracts, where literal interpretation of contractual provision would tend to make provision inoperative and to involve an absurdity, contract is required to be read as a whole, so as to give provision reasonable and operative interpretation. Civ.Code, §§ 1638, 1641, 1643.

#### 3. Contribution ⇐1

Where words "either party" were used throughout contract between city as distributor of electricity and telephone company for joint operation of poles in sense of "either party alone" provision that if cause of loss from such poles could not be traced to negligence of either party, damages recovered should be borne equal-

ly indicated intent that provision should cover case of loss caused by parties but which could not be traced to negligence of either party alone. Civ.Code, §§ 1638, 1641, 1643.

See Words and Phrases, Permanent Edition, for all other definitions of "Either Party".

#### 4. Contracts ⇐175(1)

Words used in a certain sense in one part of instrument are deemed to have been used in the same sense in another.

#### 5. Contribution ⇐1

Provision in contract between city as distributor of electricity and telephone company relating to joint operation of poles that if cause of loss could not be traced to negligence of "either party", damages recovered should be borne equally, referred to damages caused by parties as distinguished from compensation for injuries sustained without fault or liability which parties might incur under a contract of indemnity and authorized recovery of contribution by company for damages paid city employee for injuries caused by defective pole.

#### 6. Negligence ⇐121(2)

"Res ipsa loquitur" rule is not rule of substantive law imposing liability in absence of negligence, but is rule of evidence giving rise to inference of negligence in certain cases, providing means by which injury may be traced to negligence of party having control of instrumentality involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

#### 7. Municipal corporations ⇐873

Contract between city as distributor of electricity and telephone company to apportion equitably expenses incurred in responding in damages by reason of negligence of both parties in joint operation of poles is not unconstitutional as "giving or lending credit" of city. Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Giving or Lending Credit".

#### 8. Contribution ⇐9(5)

In telephone company's action against city as distributor of electricity for contribution under provision in contract for joint operation of poles and equal shar-

ing of damages recovered from either by reason of negligence of both, telephone company was not required to plead that there was income or revenue provided during year in question by city for purpose of meeting alleged liability. Const. art. 11, § 18.

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Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by the Pacific Telephone & Telegraph Company against the City of Lodi, a municipal corporation, for contribution toward the payment of a judgment obtained against plaintiff for injuries caused by a pole operated jointly by plaintiff and defendant. From a judgment for defendant after defendant's demurrer had been sustained without leave to amend, plaintiff appeals.

Reversed with directions.

Pillsbury, Madison & Sutro, of San Francisco, and Neumiller & Ditz, of Stockton, for appellant.

Glenn West, City Atty., of Lodi, for respondent.

SPENCE, Justice.

Plaintiff sued upon a written agreement entered into with the defendant city in 1910. The trial court sustained without leave to amend the demurrer of the defendant and entered judgment in its favor. Plaintiff appeals from said judgment.

In 1910, plaintiff was operating a telephone system and was maintaining telephone lines in the City of Lodi. The defendant city was operating an electric distribution system and was maintaining electric light and power lines in said city. In order to eliminate as far as practicable the disadvantages to the parties and to the inhabitants of said city of having two separate systems of poles, plaintiff and defendant entered into an agreement providing for the joint ownership and use of poles and the joint bearing of the expenses of maintenance thereof. The major portion of the agreement related to the division of expenses upon the general principle that any expenses incurred for the purposes of one of the parties alone should be borne by that party but that other expenses should be borne jointly. In the seventh and last clause of the agreement, liability for damages was covered by the following:

"Seventh: Damages for loss or injury to persons or property caused by the parties hereto, shall be borne as follows:

"1. If such loss or injury is caused by the negligence of either party such party alone shall satisfy and indemnify the other party against any claims based, or judgment recovered thereon.

"2. If the cause of such loss or injury cannot be traced to the negligence of either party then any damages recovered therefor shall be borne by the parties equally, and in the event that either party is required to satisfy any claim or judgment recovered for such damages, it shall have the right of contribution as against the other party, to the extent of one-half the amount of such claim or judgment."

In 1937, and while said agreement was in force and effect, one of the employees of the defendant sustained injuries while working upon one of the poles jointly owned and maintained by the parties. Said employee brought an action against the telephone company and recovered judgment. The telephone company paid said judgment and brought this action seeking to recover from the city one-half of the amount so paid.

While defendant herein was not a party to the action against the telephone company, it may be noted that on the appeal therein, the court said in *Emery v. Pacific Telephone & Telegraph Co.*, 43 Cal.App. 2d 402, at page 407, 110 P.2d 1079, at page 1083, "The conclusion of the jury was that if defendant [the telephone company] and the city of Lodi had exercised ordinary care and supervision to maintain this pole in a safe condition the accident would not have happened." And with respect to the admissibility in evidence in that action of the agreement sued upon in this action, the court said on page 407 of 43 Cal.App.2d, on page 1082 of 110 P.2d, "Also, inasmuch as certain officials and employees of the city of Lodi were called as witnesses on behalf of defendant, the contract was properly admitted to prove bias or prejudice, for it appeared from the contract that the city might be obligated to pay one-half of any judgment obtained by plaintiff. The only way this bias could be shown was by the agreement itself."

It is stated in the city's brief that the negligence found by the jury in the action against the telephone company "consisted in the pole itself being allowed to



get into a rotted and unstable condition" and it is conceded that the telephone company sufficiently alleged in the present action that the injuries to Emery resulted from the negligence of both parties to this action. The agreement was attached to the complaint as an exhibit and was incorporated into the complaint by reference. It was alleged in the complaint that the injuries to Emery "cannot be traced to any negligence of either plaintiff or defendant, alone, and, under the terms and the provisions of said agreement dated November 7, 1910, the damages therefor should be borne by plaintiff and defendant equally."

Plaintiff contends that the trial court erred in sustaining defendant's demurrer herein and in entering judgment in favor of defendant. In our opinion this contention must be sustained.

[1] If the language of paragraph 2 of the seventh clause of the agreement is read without regard to other provisions of said clause and without regard to the provisions of the remaining clauses of the agreement, its meaning is not entirely clear. Taken literally, it would seem to provide for the sharing by the parties to the agreement of any expense incurred by reason of "damages" recovered by a third person in the event that neither of the parties to the agreement was at fault. But ordinarily there could be no liability to third persons for "damages" in the absence of fault on the part of at least one of the parties to the agreement. It therefore appears that such literal interpretation of said paragraph 2 tends to make said paragraph inoperative and to involve an absurdity. Such interpretation is to be avoided if said paragraph can be given an interpretation which will make it operative and reasonable (Civil Code, sec. 1643) and an interpretation which will not involve an absurdity. (Civil Code, sec. 1638).

[2] When the agreement of the parties is read as a whole, we believe that the meaning of said paragraph 2 of the seventh clause becomes entirely clear. This is the proper approach to the interpretation of said paragraph as it is provided in section 1641 of the Civil Code, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, *each clause helping to interpret the other.*" (Italics ours.)

[3,4] As above indicated, the major portion of the agreement related to the

division of expenses upon the general principle that any expenses incurred for the purposes of one of the parties alone should be borne by that party but that other expenses should be borne jointly. It seems clear from a reading of the agreement as a whole that it was the intention of the parties to agree with respect to the manner of bearing all expenses that might be incurred as the result of the joint ownership, use and maintenance of said poles. The seventh clause, which contained only the two numbered paragraphs above quoted, provided for the manner of bearing expenses for "damages for loss or injury to persons *caused by the parties hereto.*" (Italics ours.) This wording, standing at the beginning of the seventh clause, indicates that said clause was intended to cover damages "caused by" both parties to the agreement and not merely damages caused by one of said parties. Turning to the first of the two numbered paragraphs of said clause, the parties agreed that "If such loss or injury is caused by the negligence of either party, such party alone shall satisfy and indemnify the other party against any claims based, or judgment recovered thereon." That paragraph was admittedly intended by the parties to cover the case of loss or injury caused by the negligence of either party alone. Turning to the second of the two numbered paragraphs of said clause, the parties agreed that "If the cause of such loss or injury cannot be traced to the negligence of either party then any damages recovered therefor shall be borne by the parties equally, and in the event that either party is required to satisfy any claim or judgment recovered for such damages, it shall have the right of contribution as against the other party, to the extent of one-half the amount of such claim or judgment." In the light of the other provisions of said seventh clause and in the light of provisions of the remaining clauses of the agreement, we believe it clear that the second numbered paragraph was intended by the parties to cover the case of loss or injury "caused by the parties" but which could not be "traced to the negligence of either party" *alone*, or, in other words, loss or injury caused by the negligence of both parties. Under the allegations of plaintiff's complaint, such was the case presented to the trial court upon the hearing of the demurrer.

Defendant argues against the above interpretation of said second numbered para-

graph because it is claimed that such interpretation requires the writing into said paragraph of the word "alone". We do not so view the situation. Such interpretation merely involves the interpretation of the words used by the parties themselves, each clause of the agreement being used in helping to interpret the other. (Civil Code, sec. 1641). To adopt the interpretation now sought by defendant would require a holding that the parties intended to omit from their agreement any provision for bearing expenses incurred for damages caused by the negligence of both parties which intention is contrary to the clear implication of the opening sentence of the seventh clause of the agreement and is contrary to the apparent purpose of the entire agreement which was to provide for the manner of bearing all expenses which might be incurred. It would seem that the parties must have had in mind the most probable field of liability for damages to others in the joint ownership and maintenance of the poles which was the field of liability in cases involving the joint negligence of the parties and that the parties must have intended to provide for the bearing of expenses with respect thereto. Furthermore the words "either party" were admittedly used in the first numbered paragraph of the seventh clause in the sense of either party *alone* and likewise, wherever said words were used in other clauses of the agreement, they were used in the sense of either party *alone*. (First Clause, paragraph B; First Clause, paragraph H; Second Clause, paragraph A; Second Clause, Paragraph G; Fourth Clause, paragraph G.) It is a familiar rule of construction that "words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another." *Pringle v. Wilson*, 156 Cal. 313, 319, 104 P. 316, 319, 24 L.R.A.,N.S., 1090. We find nothing in the agreement indicating any intention to use the words "either party" in the second numbered paragraph of the seventh clause in any different sense from that in which they were used at all other places in the agreement and, on the other hand, we find compelling reasons for interpreting them in the same sense. This interpretation is in line with the interpretation placed upon the agreement by the court in the action against the telephone company in ruling upon the admissibility in evidence of said agreement. *Emery v. Pacific Tele-*

*phone & Telegraph Co.*, 43 Cal.App.2d 402, 407, 110 P.2d 1079.

[5, 6] Defendant argues at some length in an endeavor to show that said second numbered paragraph might have some meaning and might be operative under the interpretation for which defendant contends. We are not impressed by defendant's argument. It is suggested that said paragraph might have been intended to cover "liability in workmen's compensation cases, which are not dependent upon negligence." It is a sufficient answer to this suggestion to point out first, that the seventh clause, in its opening sentence, shows that this clause was intended to refer to "damages" for injuries to persons "caused by the parties hereto" and not to "compensation", as distinguished from "damages", for injuries sustained without fault of the parties to the agreement or either of them; and second, that the parties could not have had in mind liability for workmen's compensation as there was no liability imposed upon employers for workmen's compensation at the time the agreement was executed in 1910. It is also suggested by defendant that said paragraph might have been intended to cover cases where "In order to place a jointly owned pole on another's land, it might be agreed to indemnify such other person against loss or damage exclusive of negligence." This suggestion concerns a liability which the parties might possibly incur as the result of a contract of indemnity executed in favor of some third person. We do not believe that said paragraph was intended to cover such possible contractual liability but only such liability as might be imposed by law for "damages for loss or injury to persons or property caused by the parties hereto." Finally, it is suggested by defendant that said paragraph might have been intended to apply in cases in which liability might be imposed under the *res ipsa loquitur* rule. This suggestion overlooks the fact that the *res ipsa loquitur* rule is not a rule of substantive law imposing liability in the absence of negligence but is a rule of evidence giving rise to an inference of negligence in certain cases. Where the *res ipsa loquitur* doctrine is applicable, said doctrine merely provides the means by which the injury may be "traced to the negligence" of the party or parties having the control and management of the instrumentality involved.

[7,8] Defendant makes two other contentions in support of the trial court's ruling. It is contended that "if the contract is interpreted so as to render the city liable to contribute one-half of this loss to the telephone company, it is to that extent unconstitutional and void." We find no merit in this contention. Defendant cites and relies upon Section 31 of Article IV of the Constitution denying the power of "giving or lending, of the credit of the State, or of any \* \* \* city." But the agreement before us did not purport to give or lend the credit of the city. The second paragraph of the seventh clause of said agreement constituted merely an agreement between a company engaged in the telephone business and a city engaged in its proprietary capacity in the business of distributing electrical energy to apportion equitably the expenses incurred by them in responding in damages under the liability imposed upon them by law by reason of the negligence of both parties. We see no objection, constitutional or otherwise, to such an agreement and it is certain that no such objection would have been raised by the city in the event that some third person had recovered judgment against the city alone as the result of the negligence of both parties. Defendant further contends that "the complaint does not state a cause of action for the reason that it does not state that there was income or revenue provided during the year in question, by the city for the purpose of meeting the alleged liability." In this connection, defendant cites and relies upon Section 18 of Article XI of the Constitution. We believe this contention to be likewise without merit. As to the year "in question", defendant states "Whether that year be 1910, the year in which the contract is alleged to have been made, or 1923, the year in which it is alleged that the pole in question passed into joint ownership, or the year 1937, the year in which Emery was injured, or the year 1939, the year in which the judgment of the Superior Court was rendered, or the year 1941, being the year in which the telephone company paid Emery the money, is a problem for plaintiff to figure out and to cover by appropriate allegations in the complaint." Defendant cites no authority to support its contention and the settled rule seems to be that plaintiff was not required to plead such facts. *Kennedy v. City of Gustine*, 199 Cal. 251, 248 P. 910; *Johnson v. County of Yuba*, 103 Cal. 538, 37 P. 528.

For the reasons stated, we are of the opinion that the trial court erred in sustaining defendant's demurrer without leave to amend and in entering judgment in favor of defendant.

The judgment is reversed with directions to the trial court to overrule the demurrer.

NOURSE, P. J., and DOOLING, J.,  
pro tem, concur.



58 Cal.App.2d 900

PEOPLE v. SMITH.

Cr. 3698.

District Court of Appeal, Second District.  
Division 2, California.

May 26, 1943.

Criminal law ☞1182

Where defendant filed no brief on appeal and on return date of order to show cause why appeal should not be dismissed for want of prosecution there was no appearance on behalf of defendant by brief or otherwise, judgment and order denying motion for new trial were affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding by the People, etc., against Anna B. Smith. From an adverse judgment and order, the defendant appeals.

Affirmed.

A. D. Orme and George S. Carter, both of Pasadena, for appellant.

Robert W. Kenny, Atty. Gen., for respondent.

PER CURIAM.

The transcripts on appeal were filed in this court March 25, 1943. No brief having been filed, and order to show cause why the appeal should not be dismissed for want of prosecution was issued April 30, 1943, returnable May 26, 1943. On the latter date there was no appearance on behalf of appellant by brief or otherwise. Pur-



suant to the provisions of section 1253 of the Penal Code, the judgment and the order of the trial court denying motion for a new trial are, and each of them is, affirmed.



**OETTINGER v. STEWART et ux.\***

Civ. 13785.

District Court of Appeal, Second District,  
Division 3, California.

May 28, 1943.

Rehearing Denied June 21, 1943.

Hearing Denied July 26, 1943.

**1. Negligence**  $\Rightarrow$  32(2)

Where defendants were engaged in business of renting apartments and displayed sign visible to public indicating that business, there was "invitation" to persons looking for apartments to rent to enter and make inquiry, so that person making inquiry was an "invitee" and the invitation included an invitation for departure from building.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitation" and "Invitee".

**2. Negligence**  $\Rightarrow$  32(3)

Where defendants, engaged in business of renting apartments, extended invitation to persons looking for apartments to rent to enter and make inquiry, even if plaintiff, who entered for that purpose, deviated from the invitation while in building, plaintiff was an "invitee" when accident happened during plaintiff's departure from building.

**3. Negligence**  $\Rightarrow$  32(1)

The degree of care owed to an invitee is ordinary care.

**4. Negligence**  $\Rightarrow$  32(1)

If licensee's presence on premises is known to owner, the owner owes licensee duty to exercise ordinary care to avoid injury to licensee through active negligence.

**5. Negligence**  $\Rightarrow$  32(1)

Where plaintiff entered defendants' building to look for an apartment to rent, defendants owed to plaintiff duty to exercise ordinary care to avoid injury to plain-

tiff, regardless of whether she was an invitee or licensee.

**6. Appeal and error**  $\Rightarrow$  1066

Negligence  $\Rightarrow$  138(3), 139(1)

Where plaintiff entered defendants' building to look for apartment to rent and was injured on departing from building when a defendant fell down steps and struck plaintiff, in action for injuries, instruction regarding duty owed to licensee and instruction regarding duty owed to trespasser were inapplicable, confusing, and prejudicial.

**7. Trial**  $\Rightarrow$  296(3)

Where plaintiff entered defendants' building to look for apartment to rent and was injured on departing from building when a defendant fell down steps and struck plaintiff, in action for injuries, error in giving instructions regarding duty owed to licensee and to trespasser was not removed by another instruction regarding licensor's duty when licensee's presence on premises is known.

**8. Negligence**  $\Rightarrow$  138(3)

Where plaintiff entered defendants' building to look for apartment to rent and was injured on departing from building when a defendant fell down steps and struck plaintiff, where unavoidable accident was alleged as defense to action for injuries, it was not error to give instruction regarding unavoidable accident.

**9. Negligence**  $\Rightarrow$  138(4)

Where plaintiff entered defendants' building to look for apartment to rent and was injured on departing from building when a defendant fell down steps and struck plaintiff, who failed to make effort to avoid injury, in action for injuries it was not error to give instruction regarding imminent peril.

**10. Negligence**  $\Rightarrow$  138(3)

Where plaintiff entered defendants' building to look for apartment to rent and was injured on departing from building when a defendant fell down steps and struck plaintiff, who failed to make effort to avoid injury, in action for injuries evidence did not authorize instruction regarding defense of assumption of risk.

**11. Negligence**  $\Rightarrow$  121(2)

Mere fact that accident happened, when considered alone, does not support an inference of negligence.

\* Subsequent opinion 148 P.2d 19.

## 12. Trial ⇐243

Instruction stating general rule that mere happening of accident does not support an inference of negligence and stating exceptions to the general rule was not conflicting.

## 13. Appeal and error ⇐1064(1)

Negligence ⇐138(2)

Trial ⇐243

In negligence action, instruction that mere fact that accident happened does not support inference that some party to the action was negligent and instruction that from happening of accident involved in case there arises an inference that proximate cause was some negligent conduct on part of defendants were conflicting, confusing and prejudicial.

## 14. Negligence ⇐138(3)

Where plaintiff entered defendants' building to look for apartment to rent and was injured on departing from building when a defendant fell down steps and struck plaintiff, in action for injuries instruction correctly applied rule of "res ipsa loquitur" to the facts of the case.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

## 15. Appeal and error ⇐1064(1)

Trial ⇐243

Where plaintiff entered defendants' building to look for apartment to rent and on departing from building was injured when a defendant fell down steps and struck plaintiff, in action for injuries, instruction which placed on plaintiff duty of proving cause of defendant's falling and directed finding for defendants even if defendant who fell failed to explain or excuse her actions was prejudicially erroneous since it nullified instruction on res ipsa loquitur.

Appeal from Superior Court, Los Angeles County; Joseph Marchetti, Judge pro tem.

Personal injury action by Ruth V. W. Oettinger against Edwin Stewart and wife. Judgment for defendants, and plaintiff appeals.

Reversed.

Thurlow T. Taft, of Santa Monica, for appellant.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment, entered upon a verdict, in favor of defendants in an action to recover damages for personal injuries.

Plaintiff contends that the trial court erred prejudicially in giving certain instructions, and in refusing to give other instructions requested by plaintiff.

Defendants, husband and wife, were owners and managers of an apartment building in Santa Monica. A small cement porch was at the front entrance to the building. There were four cement steps descending from the porch to the sidewalk on the premises. The first apartment in the building, approximately 12 feet from the front door, was occupied by defendants as living quarters and was used by them as the office of the building. The word "Office" was on the wall just above the doorbell next to the entrance door to defendants' apartment. On July 10, 1940, the day of the accident, between 2 and 3 p. m., plaintiff, who was 71 years of age, went to the apartment building to inquire whether there was an apartment for rent.

Since defendant May Stewart was the defendant involved in the actual happening of the accident, she will be referred to hereinafter as the defendant. Plaintiff and defendant were the only persons present when the accident occurred.

Plaintiff testified that she entered the apartment building through the front door, and rang the bell at the door of the office; that defendant opened the door, asked plaintiff to come in, and plaintiff went into the apartment and sat down, and told defendant she was looking for a single apartment; that defendant told her she had no vacant single apartment; that plaintiff then told defendant where she was living and why she was moving; that plaintiff stayed about 10 minutes and, when she arose to leave, defendant opened the door into the main hallway and followed plaintiff onto the porch; that plaintiff descended the steps from the porch to the sidewalk and started away, and then defendant who was on the porch said she would have a vacancy in August; that plaintiff then turned around, stood almost directly in front of the lower step and said that would not do because her rent was up on July 18th and she wanted to move before that time; that defendant was then standing in front of plaintiff on the "very edge of the porch"; that defendant "looked up"

and "started forward and the heel of her left foot caught," and instantly she fell upon plaintiff (the deposition of plaintiff stated that defendant walked to the edge of the porch and then started to step down and caught her heel); that as defendant fell she threw up her arms, struck plaintiff and knocked her down upon the public sidewalk (that sidewalk was about 2 feet from the bottom step of the porch); and that plaintiff didn't move while defendant was falling.

Defendant testified that, in response to the ringing of the doorbell by plaintiff, she opened the door and that plaintiff, whom she had never seen before, inquired whether defendant had a vacant apartment; that defendant replied that she did not have but might have one in the fall; that plaintiff then said she would have to sit down a minute, that she had had lunch at Sheetz' and felt "kind of sick"; that the door to defendant's apartment was open and plaintiff entered and sat on the chair nearest the door; that plaintiff and defendant "sat and visited," and plaintiff stated she wanted a single apartment, and had called at the apartment building across the street; that nothing further was mentioned about a vacancy at the apartment house of defendant; that when plaintiff arose to leave, defendant preceded her and opened the door into the main hall and also went with plaintiff to the front door of the building and opened it; that defendant then followed plaintiff onto the porch and plaintiff went to the bottom of the steps; that defendant went to the top of the steps, the very edge of the porch; that they engaged in casual conversation; that defendant looked up at the sky, remarked about the beautiful sky and day, and gave some parting greeting; that she lost her balance and fell forward; that defendant did not know what happened and had no forewarning of a sinking spell; that she did not know whether she fainted; that she did not catch her heel or stub her toe and did not start to walk down the steps; that she just sank down and started sliding and "flying" down the steps; that she tried to stop herself and went down on her left knee to avoid striking plaintiff, but she "must have brushed against her," and plaintiff seemed to "crumble down"; and that plaintiff "just stood there" while defendant was falling.

Plaintiff testified in rebuttal that she may have told defendant she ate at Sheetz'

restaurant, but she did not tell defendant that something had "disagreed" with her, and plaintiff did not say she would like to sit down and rest. (Plaintiff's deposition, which was received in evidence, stated in part that plaintiff did not know what she and defendant talked about after she learned there were no vacancies, "just trifles" but nothing she remembered.)

[1-4] (1) An instruction given by the court included the following: "An invitee who enters upon portions of the premises where she has no right to enter becomes a licensee and the only duty to her then is to refrain from wilful or wanton injury." Another given instruction related to the status and rights of a trespasser and the duty of a landowner toward a trespasser. Plaintiff contends that those instructions were prejudicial for the reason there was no testimony that plaintiff went upon any portion of the premises where she had no right to go as an invitee. There was testimony on behalf of defendants that plaintiff's inquiry concerning a vacancy was answered at the door of defendant's office before plaintiff entered the office, and that plaintiff entered the office thereafter without invitation and for the purpose of resting. There was testimony on behalf of plaintiff that the conversation concerning a vacancy occurred after she had entered the office upon express invitation by defendants. One of defendants' contentions at the trial was that plaintiff's status as an invitee ended at the door of defendants' office when she was told there was no vacancy, and that thereafter she was a licensee. There is no dispute about the facts that defendants were engaged in the business of renting apartments and that they displayed signs visible to the public, indicating that business. This constituted an invitation to persons looking for apartments to rent, as was plaintiff, to enter and make inquiry. Plaintiff's status when she made such entry was therefore that of an invitee. Even if she deviated from the invitation, as defendant contends, by going into defendant's own apartment and sitting down there after she had been told that defendant had no vacant apartments, the invitation to enter included an invitation for plaintiff's departure from the building. The accident occurred during such departure, not during the deviation, if any, and plaintiff was an invitee when the accident happened. Moreover, it was immaterial whether plaintiff was an invitee or



licensee when the accident occurred. The degree of care owed to an invitee is ordinary care. If a licensee's presence on the premises is known to the owner, the defendant owner owes the licensee the duty to exercise ordinary care to avoid injury to him through active negligence. It was clear and undisputed that plaintiff was in defendant's presence all of the time plaintiff was on the premises after plaintiff rang defendant's door bell. The instruction to the effect that the only duty which is owed to a licensee by an owner of premises is to refrain from wilful or wanton injury was a statement of a general rule which applies to cases relating to the duty owed to a licensee with respect to the condition of premises—that is to cases involving passive negligence as distinguished from active negligence. There was no contention herein that the injury resulted by reason of the condition of the premises or that passive negligence was involved.

[5-7] Whether plaintiff was an invitee or a licensee the duty owed by defendant to plaintiff, under such circumstances, was to exercise ordinary care to avoid injury to plaintiff. The evidence did not justify any reference to a duty to refrain from *wilful* or *wanton* injury, and the instruction that the only duty which is owed a licensee is to refrain from wilful or wanton injury and the instruction relative to the duty owed to a trespasser were inapplicable to the case, tended to confuse the issues, and were prejudicially erroneous. The confusion caused by, and the prejudicial effect of, those instructions were not removed by a given instruction to the effect that when a licensee's presence on the premises is known to the licensor, the licensor is bound to exercise ordinary care to avoid injuring the licensee by any overt act.

[8] (2) Plaintiff objects to a given instruction relative to unavoidable accident, and asserts there was no basis in the evidence for submitting to the jury the question whether the injury "occurred without having been proximately caused by negligence." Unavoidable accident was alleged as a defense. It was not error to give the instruction.

[9] (3) Plaintiff also objects to an instruction as to imminent peril which was given. The contention is that the instruction, although a correct statement of the law, was not applicable to this case because there was no evidence upon which the

jury could have found that defendant Mrs. Stewart was "suddenly confronted with unexpected and imminent danger" when she, herself, was without negligence. Defendants state that the instruction was not given at their request, but was requested by plaintiff and was for plaintiff's benefit in that it furnished the jury a probable explanation of plaintiff's failure to make an effort to avoid the injury. There was no indorsement upon the instruction to indicate whether it was requested by plaintiff or defendant or whether it was given or refused. It appears from the briefs that the parties agree that the instruction was given. The instruction does not refer specifically to defendants or to plaintiff, but refers generally to "A person who, without negligence on his part, is suddenly confronted with danger \* \* \*." Irrespective of whether defendant was such a person as described in that instruction, if plaintiff was such a person the instruction was applicable to the case. Plaintiff does not contend that plaintiff was not such a person. It was not error to give the instruction.

[10] (4) The court gave an instruction that if the plaintiff voluntarily placed herself in a position of danger, or if she failed to remove herself from a position of danger, if by the exercise of ordinary care she could have removed herself, then she must assume the risk of injury ordinarily incident to such position. Plaintiff asserts there was no evidence to support a defense that plaintiff voluntarily placed herself in a position of danger or to support a defense of assumption of risk and that the instruction should not have been given. Whether a position is one of danger is not to be determined by subsequent events, but by the situation reasonably apparent to the person whose conduct is in question when he takes or remains in the position. There is nothing about the position of a person who stands at the bottom of a four step flight of stairs conversing with another person at the top, which, with nothing more, should cause the person at the bottom, in the exercise of ordinary care, to regard the position as one of danger. That instruction should not have been given.

(5) Plaintiff contends that certain given instructions were conflicting and prejudicial. One of the instructions so referred to was: "The mere fact that an accident happened, considered alone, does not sup-

port an inference that some party, or any party, to this action was negligent." Another instruction referred to in such contention was in part: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant." A further instruction so referred to was in part: "Lest these statements give you an incorrect understanding of the law generally, I would inform you that they constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. However, certain exceptional circumstances, when existent, authorize the exceptional rule \* \* \*." [Here various circumstances are stated.] When the conditions I have mentioned exist, the inference of negligence, to which they give birth, will support a verdict for the plaintiff, in the absence of a showing by defendant that offsets the inference." In discussing these three instructions they will be referred to as first, second, and third instructions respectively.

[11-14] It is true that the mere fact that an accident happened, when considered alone, does not support an inference of negligence (*White v. Spreckels*, 1909, 10 Cal.App. 287, 294, 101 P. 920); however, the first of the three instructions just referred to was not limited to such a general statement but specifically stated that such happening would not "support an inference that *some party, or any party, to this action* was negligent." (Italics added.) The second instruction referred to stated in effect that the mere happening of the accident does support an inference of negligence on the part of defendant. It is to be noted that the third instruction included a statement to the effect that the provisions of the second instruction constituted an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The statement of the general rule in the third instruction was limited to a general statement applying to an accident in general and did not specifically refer

to the present action or any party thereto. The general rule as stated in the third instruction and the exception to the rule as therein stated were not in conflict. The first instruction that the "mere fact that an accident happened \* \* \* does not support an inference *that some party \* \* \* to this action was negligent*," and the second instruction that, "From the happening of the accident involved in this case \* \* \* there arises an inference that the proximate cause \* \* \* was \* \* \* some negligent conduct on the part of the defendant," were conflicting, confusing, and prejudicial. See *England v. Hospital of Good Samaritan*, 1937, 22 Cal.App.2d 226, 230, 70 P.2d 692. The second instruction correctly applied the rule of *res ipsa loquitur* to the facts of plaintiff's case. While plaintiff was standing still upon the sidewalk at the foot of the steps, defendant May Stewart fell down the steps and upon plaintiff. The movements of said defendant immediately preceding her fall were not caused, influenced, or interfered with by the action of any other person, force, or agency.

[15] The court gave the following instruction: "If, after considering all of the evidence, you find that the accident might have been caused in several different ways, and you further cannot determine what was the proximate cause of the accident which caused plaintiff's injuries, then your verdict must be for the defendants." This instruction placed upon plaintiff the duty of proving the cause of defendant's falling, and directed a finding in favor of defendants even in the event that defendant May Stewart failed to explain or excuse her actions. It nullified the instruction on *res ipsa loquitur* and was prejudicially erroneous.

It is not necessary to discuss other given instructions which appellant asserts were erroneous or to discuss her contentions relative to the refusal to give instructions requested by her.

The judgment is reversed.

SHINN, Acting P. J., and SHAW, J. pro tem., concur.

58 Cal.App.2d 883

**CORELY v. HENNESSY.**

Civ. 12355.

District Court of Appeal, First District,  
Division 2, California.

May 28, 1943.

**1. Trusts**  $\Rightarrow$ 44(1)

In action to recover money allegedly held in trust, evidence sustained a finding that no trust was established.

**2. Trusts**  $\Rightarrow$ 358(1)

A "trust" will not be created by judicial decree where there is no property upon which the trust can be impressed, and when the subject matter of the trust is money the plaintiff's right to an adjudication of ownership depends upon his ability to identify the money as a particular fund or to trace it into specific property.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

**3. Trusts**  $\Rightarrow$ 352

When the money of the trustor can be traced into a particular fund, or deposit, though it be mingled with other money, the beneficiary may enforce the trust.

**4. Trusts**  $\Rightarrow$ 352, 358(1)

In action to recover fund allegedly held in trust, an express admission that the fund could not be traced and a finding that no part of the fund was mingled with funds of the alleged trustee, precluded recovery, especially where it could properly be inferred that alleged beneficiary had been paid the amount he sought to recover.

**5. Limitation of actions**  $\Rightarrow$ 146(2)

Where statement of account was alleged to have been made orally in 1923, attempt of plaintiff to avoid statute of limitations by showing an oral restatement in 1930, and again in 1932 and some payments from time to time continuing to death of deceased debtor, was ineffective where no evidence was offered that any writing passed from deceased acknowledging the debt or any part of it. Code Civ.Proc. § 337, subd. 2.

**6. Witnesses**  $\Rightarrow$ 128

In action to enforce a trust against a decedent's estate and upon an account stated, where facts precluded enforcement of trust, action of trial court under dead

man's statute in ruling that plaintiff could testify but that if any testimony was given other than to establish the trust, it would be stricken out, was proper in view of rule that the statute does not disqualify a witness called upon to establish a trust in which he claims to be the beneficiary, since property held in trust is outside the estate of decedent. Code Civ.Proc. § 1880.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by John H. Corely against Frank J. Hennessy, as executor of the last will and testament of Edward J. Kenney, also known as Edward Kenney, deceased, to recover upon a claim for money allegedly held in trust for plaintiff by the decedent. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

H. R. Whiting, Morgan V. Spicer, and Vincent Surr, all of San Francisco, for appellant.

Frank J. Hennessy, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover upon a claim for money alleged to have been held in trust for him by the decedent Edward J. Kenney. The trial court gave defendant judgment based upon findings that there was nothing due plaintiff, that no funds were held by the decedent in trust for plaintiff, that decedent did not mingle with his own any moneys belonging to plaintiff, and that the cause of action was barred by the statute of limitations. In his appeal from the judgment plaintiff states three grounds—(1) that the fact that the moneys sued for were acquired through illegal gambling and taking wagers on horse races should not affect his right of recovery; (2) that the statutes of limitations did not begin to run until the death of decedent, because there had been no repudiation of the alleged trust; (3) that the trial court erred in refusing to permit plaintiff to testify except as to the matter of the alleged trust.

The complaint pleads a simple cause of action for money due the claimant in some respects in the nature of an oral stated account, and prays that the sum found to be due "be paid by said executor in the due course of the administration



\* \* \*." It also pleads that the sum claimed had been received and "held in trust" by the decedent, but that said sum "cannot be specifically identified for the reason that the said funds have been, and were prior to the death of said decedent, and are now, mingled with the funds of said decedent." None of the circumstances of the creation of the alleged trust is pleaded, and no proof was made that any of the money claimed by appellant was mingled with other funds of the decedent. During the course of the trial the court offered appellant leave to amend his complaint to more clearly plead a trust, but no amendment was made, and his counsel conceded that he was unable to trace the money or show that it had been mingled with other funds.

[1] A brief statement of the facts will suffice, as our decision must rest not so much upon the facts proved but upon the facts which plaintiff failed to prove to make a case for relief. For some years prior to 1917 plaintiff and deceased had been employed by "bookmaking" concerns, and in that year opened a place of their own where they continued the same operations. The sister of the plaintiff testified that the two were partners, other testimony was given that plaintiff was employed by deceased until 1923 when plaintiff was required to leave the neighborhood because of fear of arrest. The sister of plaintiff testified that in 1923 he stopped working because of ill health, that deceased then had \$25,000 in a safe deposit box belonging to the "partnership", that he promised to keep one half of that sum in trust for plaintiff. From that date until his death in 1941 the deceased paid small sums either to plaintiff or to his sister amounting to over \$8,000. The sister testified that these payments were in partial performance of the "trust." Other testimony was given that they were of a charitable nature advanced to relieve the poverty of plaintiff and his sister. The testimony of the sister relating to the fact of partnership, the amount of cash deposited by deceased, and the amount and nature of payments advanced by deceased, was such that the trial court must have found it unconvincing and short of the measure of proof necessary to establish a trust of this character.

[2, 3] The decision must rest upon the sound principle that a trust will not be created by judicial decree when there is no property upon which the trust can be im-

pressed, that, when "the subject matter of the trust was money, the plaintiff's right to an adjudication of ownership depends upon his ability to identify the money as a particular fund or to trace it into specific property." 25 Cal.Jur. p. 254; *Elizalde v. Elizalde*, 137 Cal. 634, 641, 66 P. 369, 70 P. 861; *Burke v. Maguire*, 154 Cal. 456, 469, 98 P. 21; *Estate of Arms*, 186 Cal. 554, 561, 199 P. 1053. In *Newport v. Hatton*, 195 Cal. 132, 150, 231 P. 987, 993, the supreme court, citing the *Elizalde* and *Arms* opinions, said: "When the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and enforce the trust. Though the identical pieces of coin cannot be ascertained, yet if there is so much belonging to the trust in a general heap of private and trust funds, the cestui que trust is entitled to take so much out." In *Noble v. Noble*, 198 Cal. 129, 134, 243 P. 439, 43 A.L.R. 1235, the court cited and distinguished all the foregoing, but placed the right to impress a trust squarely upon proof of a commingling of trust funds with the general funds of the trustee. In *Mitchell v. Dunn*, 211 Cal. 129, 136, 294 P. 386, 389, these authorities were again reviewed and the court said: "The rule is now settled in this state that, when the money of the trustor can be traced into a particular fund, or deposit, though it be mingled with other money, the beneficiary may enforce the trust."

[4] Here we have the express admission in accordance with the averments of the complaint, that the fund could not be traced, and the finding that no part of it was mingled with other funds of the deceased. This finding was based in part on the admission that such proof could not have been made, and the wholly unsatisfactory evidence of appellant that the money was deposited by deceased in his private safe deposit vault in 1923, and that nothing more was known as to its disposition. In fact the evidence of the amount deposited was so unsatisfactory that the trial court might properly infer that the deceased had paid to the appellant his entire share of the fund long before his decease.

[5] This leaves the case as a simple action upon an account stated, the statement of the account having been made orally in 1923. To avoid the plea of the statute of limitations the appellant endeavored to

show an oral restatement in 1930, and again in 1932, and some payments made from time to time and continuing to the death of the deceased. But no evidence was offered, and no contention is made, that any writing passed from deceased acknowledging the debt or any part of it. The action is therefore barred under the provision of subdivision 2 of section 337 of the Code of Civil Procedure since no acknowledgment or promise to continue the debt was made within the provisions of section 360 of the same code. Appellant's only answers to the plea of the statute of limitations are that the statute does not run against an express trust until the trustee has repudiated the trust, and that, the two men having been close friends, the appellant might assume that the bar would not be pleaded. But the trial court found upon substantial evidence that no trust arose from the transactions pleaded; not merely that appellant failed to prove his right to have a trust imposed by judicial decree within the rule of the cases cited, but that he failed to prove that the deceased held any funds in trust for him. For these reasons the plea of the statute of limitations requires an affirmation of the judgment.

[6] Appellant argues that he was prejudiced by the refusal of the trial court to permit him to testify after objection that he was disqualified by section 1880 of the Code of Civil Procedure. The trial court ruled that appellant would be permitted to testify but that if any testimony was given other than to establish a trust it would be stricken out. The appellant was thereupon withdrawn as a witness by his own counsel. In the early case of *Myers v. Reinstein*, 67 Cal. 89, 91, 7 P. 192, it was held that the code section did not disqualify a witness who was called to establish a trust in which he claimed to be the beneficiary since the claim or demand was not against the estate of decedent, but it was a claim that the property was held in trust and hence outside the estate. This rule has not been departed from, and hence there was no error in the trial court's ruling limiting the witness to such evidence.

We do not consider the question of public policy to which the major portion of the briefs are devoted. If appellant is unable to prove a trust relation, and thus avoid the plea of the statute of limitations, it is immaterial whether he and the deceased were engaged in an unlawful business through which the funds were origin-

ally accumulated. And it is also immaterial whether, assuming that the entire fund was amassed through illegal practices, the question of public policy falls with the statement of the account.

The judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem, concur.



58 Cal.App.2d 591

LEEPER v. NIELSON et al.

Civ. 6777.

District Court of Appeal, Third District,  
California.

May 15, 1943.

**1. Appeal and error ☞985**  
**Exceptions, bill of ☞51**

Whether a party has exercised due diligence in procuring settlement of bill of exceptions is largely a matter of discretion with trial judge, and, except for abuse of discretion, his determination may not be disturbed. Code Civ.Proc. § 650.

**2. Exceptions, bill of ☞50**

Moving parties in settling bill of exceptions must exercise diligence in perfecting their appeal. Code Civ.Proc. § 650.

**3. Exceptions, bill of ☞51**

Where defendants cast instituted proceedings for settlement of bill of exceptions and left engrossed bill with clerk to be forwarded to trial judge for his signature, but clerk failed to forward engrossed bill to trial judge or to call his attention thereto, trial court's action in granting plaintiff's motion, made more than six months after service of engrossed bill, for termination of proceedings on ground of lack of diligence, was not abuse of discretion. Code Civ.Proc. § 650.

Appeal from Superior Court, Sacramento County; J. G. Brunton, Judge Assigned.

Action by Thomas B. Leeper against N. J. Nielson and others. A judgment was rendered against defendants, and a notice

of appeal was given and proceedings for the settlement of a bill of exceptions were instituted by defendants. From an order terminating defendants' proceedings to settle the bill of exceptions on account of lack of diligence, defendants appeal.

Affirmed.

Busick & Busick and O. F. Meldon, all of Sacramento, for appellants.

Ralph H. Lewis, of Sacramento, for respondent.

#### PER CURIAM.

This is an appeal from an order of the trial court of Sacramento County terminating appellants' proceedings to settle a bill of exceptions, on account of a lack of diligence. The bill of exceptions was settled and directed to be engrossed, pursuant to the provisions of section 650 of the Code of Civil Procedure, by a judge who resided outside of the county. The engrossed bill was left with the clerk of said court to be forwarded to the judge for his signature and a copy of that document was served on plaintiff's attorney the same day. The clerk failed to forward the engrossed bill to the trial judge, or to call his attention to the fact that it had been left in the clerk's office for him. After more than six months had elapsed from the time of the service of the engrossed bill, the plaintiff moved the trial court to terminate the proceedings on the ground of a lack of diligence. That motion was granted.

The appellants contend that the leaving of the engrossed bill of exceptions with the clerk of the court for the trial judge, even though he resided outside of the county, fully complied with the fifth paragraph of section 650 of the Code of Civil Procedure, and affirmatively disproves the charge of lack of diligence in presenting the engrossed bill to the judge for his signature, and that the court therefore abused its discretion in terminating the proceedings.

The late Honorable J. G. Bruton, who resided at Woodland, presided in Sacramento County at the trial of a suit between the parties herein. Judgment was rendered against the defendants. Notice of appeal was given, and proceedings for the settlement of a bill of exceptions were instituted. Defendants filed a proposed bill of exceptions. To that proposed bill the plaintiff filed his proposed amendments. October 30, 1940, Judge Bruton ordered the bill settled and engrossed. The plain-

tiff stipulated to an extension of thirty days in which to present the engrossed bill. December 7, 1940, defendants left with the County Clerk of Sacramento County the engrossed bill of exceptions to be sent to Judge Bruton at Woodland, or to be delivered to him immediately upon his return to Sacramento, pursuant to section 650 of the Code of Civil Procedure, and also served upon plaintiff a copy of the proposed bill, on that last mentioned date. The clerk failed to send or deliver the engrossed bill to Judge Bruton. No further action was taken in said matter until July 10, 1941, when the plaintiff served and filed a notice of motion to terminate the proceedings for settlement of the bill of exceptions, on the ground of a lack of diligence. The motion was heard by Judge Bruton on July 21, 1941, and granted "on the grounds that the Bill of Exceptions was by counsel presented to the Clerk and never presented by counsel to the Judge in due time as prescribed by law, and upon the further grounds that appellant failed to prosecute his appeal."

After a bill of exceptions has been settled and ordered to be engrossed, paragraph 6 of section 650 of the Code of Civil Procedure provides that "*Within ten (10) days after the settlement the party who filed the bill must present it to the judge to be certified.*" (Italics added.)

[1] The question as to whether a party to an action has exercised due diligence in procuring the settlement of a bill of exceptions is largely a matter of discretion with the trial judge, and except for an abuse of discretion his determination in that regard may not be disturbed on appeal. *Wilson v. Wilson*, 207 Cal. 364, 366, 278 P. 440.

We are of the opinion we may not interfere with the discretion of the trial judge in determining that the proceedings for settlement of the bill of exceptions should be terminated for lack of diligence. In the case last cited it was held that a delay of four months in procuring the settlement of a bill of exceptions constituted a lack of diligence. The court said "This period of inaction of four months is unexcused."

[2,3] The appellants in the present case were the actors in this proceeding to settle the bill of exceptions. It was their duty to exercise diligence in perfecting their appeal. Within ten days after the court settled the bill and directed it to be



engrossed the law required "the party who filed the bill" to present it to the judge to be certified. We may assume the language of section 650 is not mandatory in that regard, and that the fact that the judge resided in a city outside of the county where the case was pending, would authorize the appellants to leave the bill with the clerk to be presented to the judge, and that this procedure would excuse a delay beyond the ten days' limitation in obtaining the judge's certificate. But this would not excuse a delay of six months during which no inquiry nor further activity was exercised to procure the signing and filing of the settled bill. It is not unreasonable to assume that the appellants were required to follow their proceedings with diligence and to inquire of the clerk whether the bill had been presented and filed, and if not to see that that routine matter was attended to promptly. This is true since the court rules require the transcript on appeal, including the bill of exceptions, to be filed within a prescribed limited time. (Rule I, sec. 1, Rules for the Supreme Court and District Courts of Appeal.) This placed the appellants on inquiry. For that reason we are unable to say the court abused its discretion in terminating the proceedings for settlement of the bill of exceptions.

In support of their contention that the appellants were purged of the charge of a lack of diligence by leaving the engrossed bill with the clerk to be presented to the judge for his signature, they rely on *Tregambo v. Comanche Mill & Min. Co.*, 57 Cal. 501, *Andrews v. Metzner*, 83 Cal.App. 764, 257 P. 203, and 5 California Jurisprudence 230, section 12. They quote from the *Tregambo* case with regard to the omission of the clerk to perform his duty by filing a demurrer which was left with him for that purpose, on account of the failure to file which the default of the defendant was entered. The court said:

"When, therefore, the demurrers were brought and deposited with the clerk for filing, they were, in contemplation of law as to the defendant, on file in the case. A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause. \* \* \* Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. Indorsing it with the time of filing is not a necessary part of filing. \* \* \*

"It was the duty of the clerk to have indorsed upon them the date of their filing. His omission of duty could not prejudice the defendant in any of its legal rights."

To the same effect are the other authorities relied on by the appellants. It will be observed the foregoing authority merely determines that when a pleading is left with the clerk and accepted by him to be filed it is deemed by law to have been filed of record. The bill of exceptions in the present case was not left with the clerk to be filed. It required the signature of the judge before it was entitled to be filed. But assuming, without so deciding, that it was the duty of the clerk to promptly forward the bill to the judge for his signature, and that his omission to do so, could not be charged to the appellants as a lack of diligence, and in so doing they may be charged with negligence in not inquiring and ascertaining why their bill had not been presented and filed during a period of over six months. *Miller v. American Central Ins. Co.*, 2 Cal.App. 271, 83 P. 289.

For the foregoing reasons we are impelled to hold that we may not interfere with the discretion of the trial judge in terminating the proceeding to settle the bill.

The order is affirmed.



58 Cal.App.2d 878

RICO v. NASSER BROS. REALTY CO. et al.

Civ. 12319.

District Court of Appeal, First District,  
Division 2, California.

May 28, 1943.

Hearing Denied July 26, 1943.

#### I. Infants 84

Under statute a minor's father is authorized to petition for an order of the superior court approving compromise of the minor's disputed claim for damages against a third person, but appointment of a guardian, appearance in court of the father or of the minor or taking of testimony relating to the extent of the minor's injuries is not required. Probate Code, § 1431.

**2. Infants** Ⓒ84

Where settlement approved by the superior court was pleaded as a bar to action for injuries sustained by minor, minor's offer to prove that in the approval proceedings no guardian was appointed, neither the father nor the minor appeared in court and that no testimony was taken relating to the extent of the minor's injuries was a prohibited "collateral attack" upon the order of settlement. Probate Code, § 1431; Code Civ.Proc. § 1916.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

**3. Judgment** Ⓒ486(1), 489

A judgment or order is not subject to collateral impeachment unless it is absolutely void, and it is not "void" unless made or entered without authority of law, or without jurisdiction. Code Civ.Proc. § 1916.

See Words and Phrases, Permanent Edition, for all other definitions of "Void Judgment".

**4. Judgment** Ⓒ518

A "direct attack" upon a judgment or order is usually one made in the same proceeding by appeal or motion, or one made in a separate suit in equity to set aside the judgment or order upon equitable grounds. Code Civ.Proc. §§ 473, 1916.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

**5. Judgment** Ⓒ485, 495(1), 518

A "collateral attack" is an attempt to avoid the effect of a judgment or order made in some other proceeding, and in such attack the invalidity of the former judgment or order must appear on the face of the record and if such invalidity or want of jurisdiction does not so appear, it will be presumed in favor of the former judgment or order that what ought to have been done was rightly done. Code Civ. Proc. §§ 473, 1916.

**6. Infants** Ⓒ84

In action for injuries sustained by minor where settlement approved by the superior court was pleaded as a bar, trial court properly rejected offers of proof which would have shown nothing more than a possible error or irregularity in the approval proceeding, where minor did not seek to set aside the order of settlement upon any grounds upon which a direct attack

could be made. Probate Code, § 1431; Code Civ.Proc. § 1916.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by James Rico, a minor by A. D. Rico, his guardian ad litem, against Nasser Brothers Realty Company and others for injuries received in a theater operated by defendants when plaintiff's foot was caught in the seat in front of him as another person sat down in the seat. From a judgment for defendants, plaintiff appeals.

Affirmed.

McGuire & Lahanier, of San Francisco, and James H. Phillips, of Oakland, for appellant.

Charles V. Barfield, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff, a minor, sued through his guardian ad litem, for damages for personal injuries received in a theatre operated by defendants when his foot was caught in the seat in front of him as another person sat down in the seat. He alleged that the injury occurred on March 26, 1936, that on March 24, 1937, he received the sum of \$250 in full settlement for his injuries and thereupon gave the defendants a release in full for all damages growing out of such injuries, that said release was given by him under a mistake of fact—that he believed his said injuries were temporary whereas he has since learned that they are permanent. On March 14, 1940, plaintiff rescinded the settlement and offered to return the money received under it. The defendants answered generally and, as a third separate defense, pleaded the settlement as a bar to this action. This defense was tried separately under the provisions of section 597 of the Code of Civil Procedure and the trial court found for the defendants. The plaintiff appeals from this judgment.

At this trial the defendants offered the judgment roll of the prior proceedings in the superior court showing that a verified petition was duly filed on behalf of the father of the minor, and the plaintiff herein, by his two attorneys asking leave to compromise the claim for \$250, that the petition came on regularly for hearing, and was approved by a judge of the superior court on March 18, 1937. Proof was

also made that the sum was paid in full and that a general release was given defendants on the same day, executed by the father, and witnessed by one of his attorneys. With this showing the defendants rested.

The plaintiff then offered to prove that neither the father nor the minor was present in court when the order of settlement was made, that no testimony relating to the extent of the injury was taken at the time, that no guardian had been appointed to represent the minor, that the injuries now appear to be permanent, that, prior to the order of settlement, the parents of the boy had consulted a physician who informed them that the ankle would soon heal, and that the father "was informed" that, unless they agreed to the settlement, they would be unable to recover anything. All these offers were rejected when the trial court granted the defendants' special plea. Before discussing the points raised by appellant it should be noted that there is no allegation, or offer of proof, of fraud or misrepresentation, and that the only charge of mistake is that relating to the medical advice of plaintiff's own physician.

The issues of law involved on the appeal are simple and for that reason we will not follow the specifications as they appear in the briefs. The order of compromise was made in pursuance of section 1431 of the Probate Code, which reads: "When a minor has a disputed claim for damages, money or other property against a third person, his father, \* \* \* shall have the right to compromise, or execute a covenant not to sue on, such claim, but before the compromise or covenant is valid it must be approved by the superior court of the county where the minor resides, upon the filing of a verified petition in writing. If the court approves the compromise or covenant and the money or the value of other property to be paid or delivered under the compromise or covenant does not exceed two thousand dollars, it may direct that the money or other property be paid or delivered to the father or mother of the minor, with or without the filing of a bond, or may require that any money so paid be deposited in a bank or trust company subject to withdrawal only upon the order of the court, or it may require a general guardian to be appointed and the money or other property to be paid or delivered to such guardian. \* \* \* The father or mother or the guardian, upon receiving such money or other property may execute

a full release and satisfaction of, or execute a covenant not to sue on the claim of the minor. \* \* \*

[1] This section authorizes the father to petition for the order, and does not require the appointment of a guardian, the appearance in court of the father, or the minor, or the taking of testimony relating to the extent of the injuries. If orderly procedure, or the good judgment of the superior court, should suggest that any one of these acts should have been done, the failure to do so was merely an error, or irregularity, committed within the conceded jurisdiction of the court. Hence every offer of proof relative to any of these items was a collateral attack upon the order of compromise because it required proof de hors the record.

"Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings." Section 1916, Code of Civil Procedure. Here there is no charge of fraud or collusion. The suggestion of want of jurisdiction is based upon counsel's assertion that the superior court should have taken certain steps which the Probate Code did not require it to take.

[2] There is no escape from the conclusion that the attack here attempted to be made upon the order of settlement is a collateral attack. The appellant does not seek to set aside that order upon any grounds upon which a direct attack could be made. He merely seeks to ignore it, and, when faced with the special pleas, makes a collateral attack upon it.

[3-5] The rule applicable is stated in 15 Cal.Jur. p. 45: "\* \* \* a judgment or order is not subject to collateral impeachment unless it is absolutely void, and it is not void unless made or entered without authority of law, or, as usually stated, without jurisdiction." A direct attack upon a judgment or order is usually one made in the same proceeding by appeal, or motion under section 473, Code of Civil Procedure, or one made in a separate suit in equity to set aside the judgment or order upon equitable grounds. A collateral attack is an attempt to avoid the effect of a judgment or order made in some other proceeding. In such attack the invalidity of the former judgment or order must appear on the face of the record. Estate of



Keet, 15 Cal.2d 238, 333, 100 P.2d 1045; *McAllister v. Superior Court*, 28 Cal.App.2d 160, 162, 82 P.2d 462. If such invalidity, or want of jurisdiction, does not appear on the face of the record, it will be presumed in favor of the former judgment, or order, that "what ought to have been done was not only done but rightly done." 15 Cal.Jur. p. 68, and cases cited.

[6] Upon these principles the trial court properly rejected all offers to prove those matters which appellant contends for since the proof of all that would have shown nothing more than a possible error, or irregularity, in the former proceedings.

The judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem, concur.



58 Cal.App.2d 827

**LEWIS et al. v. SECURITY-FIRST NAT.  
BANK OF LOS ANGELES.**

Civ. 13732.

District Court of Appeal, Second District,  
Division 2, California.

May 27, 1943.

Hearing Denied July 22, 1943.

**1. Limitation of actions** ⇨180(5)

A demurrer alleging that complaint was barred by statute of limitations was sufficient to raise issue whether the cause of action stated in complaint was barred by limitations, even though applicable sections and subsections of Code of Civil Procedure were not specified. Code Civ. Proc. § 458.

**2. Limitation of actions** ⇨180(5)

It is not necessary to comply with statute providing how statute of limitations shall be pleaded in pleading the statute by way of demurrer. Code Civ. Proc. § 458.

**3. Courts** ⇨90(1)

A later decision overrules prior decisions which conflict with it, whether the prior decisions are mentioned and commented upon or not.

**4. Limitation of actions** ⇨27

An action for damages for breach of an oral contract must be commenced within two years after cause of action accrues. Code Civ.Proc. § 339, subd. 1.

**5. Limitation of actions** ⇨46(3)

Where plaintiffs alleged that bank which loaned them money to construct a building orally agreed to procure fire insurance for plaintiffs' benefit on building, cause of action for breach thereof accrued, if at all, not later than date when building was completed, and action for breach not filed until two years after the completion was barred by limitations. Code Civ.Proc. § 339, subd. 1.

**6. Limitation of actions** ⇨177(3), 179(2)

If fraud tolls running of statute against cause of action for breach of oral contract to purchase fire insurance for plaintiffs' benefit, and fraud alleged accrued more than three years before filing of complaint, it would be essential to allege facts from which court could determine that by reasonable diligence plaintiffs could not have discovered the alleged fraud at an earlier date, and mere allegation that plaintiffs did not discover fraud prior to designated date is insufficient. Code Civ. Proc. § 338, subd. 4; § 339, subd. 1.

**7. Limitation of actions** ⇨179(2)

In borrowers' action for breach of lending bank's oral promise to procure fire insurance on building which borrowers intended to erect, complaint was insufficient to justify finding that borrowers, by use of reasonable diligence, could have discovered, before destruction of building by fire, bank's alleged fraudulent failure to perform contract so as to toll three-year statute of limitations. Code Civ.Proc. § 339, subd. 1; § 338, subd. 4; § 458.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Richard M. Lewis and another against Security-First National Bank of Los Angeles, a national banking association, to recover damages for breach of an oral contract to purchase fire insurance for plaintiffs' benefit. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Charles A. Son, of Los Angeles, for appellants.

Cleveland & Lutz, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the sustaining of a demurrer to plaintiffs' complaint as amended without leave to amend, on the ground that the alleged cause of action was barred by the statute of limitations, plaintiffs appeal.

This is an action to recover damages for breach of an oral contract to purchase fire insurance for plaintiffs' benefit, and was filed December 23, 1941.

The pertinent facts alleged in the complaint as amended are:

In February, 1937, pursuant to plaintiffs' application, defendant loaned to them the sum of \$4,000. To secure the loan plaintiffs executed a promissory note and trust deed in favor of defendant covering certain real property owned by plaintiffs, and at such time, and as part of the transaction, defendant "orally promised to procure" fire insurance covering a building plaintiffs intended to erect upon the property described in the trust deed. In June, 1937, the proposed building was completed, which building, December 23, 1940, was destroyed by fire. Defendant failed to obtain a policy of fire insurance in accordance with the terms of its agreement, and plaintiffs learned of this fact for the first time on December 26, 1940. As a result of defendant's failure to procure a policy of fire insurance covering the property which was destroyed, plaintiffs were damaged in the sum of \$4,000.

[1-3] Defendant demurred to the complaint as amended, among others, on the following ground:

"That the first amended complaint is barred by the statute of limitations of the State of California."<sup>1</sup>

The demurrer was sustained without leave to amend.

This is the sole question necessary for us to determine:

*Was plaintiffs alleged cause of action barred by the statute of limitations, section 339, subdivision 1, of the Code of Civil Procedure?*

[4] This question must be answered in the affirmative. The rule is established in California that an action to recover damages for breach of an oral contract must be commenced within two years after the cause of action accrues. (Section 339, subdivision 1, of the Code of Civil Procedure.)

[5] In the instant case plaintiffs allege that the contract, for the breach of which they are suing, was an oral contract. Since defendant did not, at any time, procure a policy of fire insurance in accordance with its alleged agreement, plaintiffs' cause of action accrued, if at all, not later than June 1, 1937, the date the building was completed upon the property described in the trust deed mentioned above. The present action was not filed until December 23, 1941. Therefore, since more than two years had elapsed after plaintiffs' cause of action accrued before the present action was commenced, it was clearly barred by the applicable provision of the statute of limitations, section 339, subdivision 1, of the Code of Civil Procedure.

[6] There is no merit in plaintiffs' contention that the statute of limitations was tolled because of defendant's fraud. If we assume (without deciding) that fraud tolls the running of the statute of limitations in a case of the nature of the present one, section 338, subdivision 4, of the Code of Civil Procedure applies; as would the established rule that where fraud is alleged as the basis for a cause of action accruing more than three years prior to the filing of a complaint, it is essential to allege facts from which the court can determine that by reasonable diligence the plaintiff could not have discovered the alleged fraud at an earlier date. (Reilly v. Richardson, 18

<sup>1</sup> It is to be noted that the language used in the demurrer was sufficient to raise the issue as to whether the cause of action stated in the complaint was barred by the statute of limitations, even though the applicable *section* and *subsection* of the Code of Civil Procedure are not specified in the demurrer. See *Bainbridge v. Stoner*, 1940, 16 Cal.2d 423, 430, 106 P.2d 423, which holds that it is not necessary to comply with the provisions of section 458 of the

Code of Civil Procedure in pleading the statute of limitations by way of *demurrer*. The *Bainbridge* case, although it does not mention them, overrules contrary statements in earlier cases, such as *Salveter v. Salveter*, 1933, 135 Cal.App. 238, 241, 26 P.2d 836; and *Union Oil Co. v. Purissima Hills Oil Co.*, 1919, 181 Cal. 479, 480, 185 P. 381. See *People v. Bateman*, 57 Cal.App.2d 585, 135 P.2d 192, and cases therein cited.

Cal.App.2d 352, 353, 63 P.2d 1180.) The foregoing rule is not met by a mere allegation that plaintiff did not discover the fraud prior to a designated date. (*Bradbury v. Higginson*, 167 Cal. 553, 558, 140 P. 254; *Montgomery v. Peterson*, 27 Cal. App. 671, 675, 151 P. 23.)

[7] In the present case the only allegations in the complaint as amended relative to plaintiffs' failure to sooner discover that defendant had not procured an insurance policy in accordance with its promise, are as follows:

"That at the time said loan was made, the plaintiffs were informed by the defendant that the loan was a loan under the National Housing Act, 12 U.S.C.A. § 1701 et seq., and that the rate of interest would be 5% per annum, defendant then and there well knowing that plaintiffs' agent was informed and believed that said Act required that the property securing a loan under the Act should be insured against destruction by fire; that the payment of principal at the rate of \$83.16 per month for 60 months as required by the note executed by the plaintiffs and as set out in the receipts given by the defendant, made the total of interest payable upon said loan greater than the amount stated to plaintiffs and the plaintiffs understood that the reason for the discrepancy was because payments on account of insurance premiums were included in the total monthly payments; that after said loan was made, defendant represented that said loan was under the National Housing Act and complied with all requirements thereof; that the defendant wrongfully failed to procure at any time or in any amount, any fire insurance upon the structure described in this complaint; that the defendant did not at any time inform the plaintiffs or either of them or the agent that no fire insurance had been obtained covering the structure erected as herein set forth, and plaintiffs did not know at any time prior to December 26, 1940, that defendant had not procured any said fire insurance in the sum of \$4000.00, or in any sum, or at all; that the plaintiffs did not procure fire insurance because of their reliance upon the defendant and the representations made as herein contained. That said defendant by its conduct, acts and

representations herein alleged, is estopped to deny that fire insurance sufficient to cover the amount of said loan was taken out and placed by said defendant, and collected by said defendant subsequent to December 23, 1940, the date of the fire loss hereinafter described.

"That on December 23, 1940, the structure erected on the property as herein alleged was wholly destroyed by fire. That plaintiffs for the first time were informed by the defendant on December 26, 1940, that no fire insurance covered said structure; that prior to said December 26, 1940, plaintiffs did not discover that defendant had not procured any fire insurance on said property at any time, in any amount, or at all."

There is nothing in the foregoing allegations which would have justified the trial court in finding that plaintiffs, by the use of reasonable diligence, could not have discovered at an earlier date the alleged fraudulent failure of defendant to perform its oral contract. Therefore, assuming (without deciding) that facts might have been alleged which would bring the present action within the purview of the statute of limitations, as set forth in section 338, subdivision 4, of the Code of Civil Procedure, plaintiffs have failed to meet the requirements of the above rules of law relative to pleading facts which show an excuse for not sooner discovering fraud.

As more than three years elapsed after the accrual of their alleged cause of action before the present action was instituted, and since facts are not alleged showing an excuse for failure to sooner discover the alleged fraud, any assumed cause of action predicated upon fraud is barred by section 338, subdivision 4, of the Code of Civil Procedure. (*Cf. Jackson v. Master Holding Corporation*, 16 Cal.2d 824, 826, 108 P.2d 673.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, J., deeming himself disqualified did not participate in the foregoing decision.

Hearing denied; SCHAUER, J., not participating.



**HELMICK v. INDUSTRIAL ACCIDENT  
COMMISSION et al.**

**Civ. 14100.**

**District Court of Appeal, Second District,  
Division 3, California.**

**May 28, 1943.**

**Hearing Denied July 26, 1943.**

**1. Workmen's compensation ☞1953**

Judgment affirming order of the Industrial Accident Commission on petition by State Insurance Fund for annulment of the order was the "law of the case" in subsequent proceeding by the claimant who filed petition to annul award made in obedience to the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

**2. Workmen's compensation ☞1953**

Where prior decision constituting law of case determined that amount claimant obtained from employer by writ of execution on an award later set aside was in fact money furnished for living expenses regardless of purpose to which it was put by claimant, that new findings revealed that large part of such money was not used for living expenses did not invalidate award made in obedience to the prior judgment.

Proceedings under the Workmen's Compensation Act on petition of Alyce J. Helmick, claimant, to annul an award of the Industrial Accident Commission. The Safway Steel Scaffolds Company of California, employer, and the State Compensation Insurance Fund are respondents.

Petition denied.

Allan L. Leonard, of Los Angeles, for petitioner.

E. A. Corten and Fred G. Goldsworthy, of San Francisco, for respondents.

PER CURIAM.

[1,2] The judgment in *Safway Steel Scaffold Co. v. Industrial Acc. Com.*, Nov. 1942, 55 Cal.App.2d 388, 130 P.2d 484, 485, establishes the law of this case. By that decision, as we interpret it, the fact that Mrs. Helmick obtained, by means of a writ of execution, the sum of \$654.78 from the company on an award subsequently set aside, establishes that it was

"in fact money furnished for living expenses," irrespective of the purpose to which it was put by Mrs. Helmick. The fact that the new findings reveal that a large part of the sum she received was not used for her living expenses does not, therefore, invalidate the award, which was made in obedience to the judgment referred to.

In the premises the petition should be and it is, denied.

SHINN, Acting P. J., PARKER WOOD, J., and BISHOP, J. pro tem., concur.



58 Cal.App.2d 616

**STRATFORD IRR. DIST. v. EMPIRE  
WATER CO. et al.**

**Civ. 3086.**

**District Court of Appeal, Fourth District,  
California.**

**May 19, 1943.**

**Hearing Denied July 15, 1943.**

**1. Waters and water courses ☞244**

A mutual water company may have right to conduct its water through a public utility's ditch without affecting public use of ditch by the utility.

**2. Eminent domain ☞196**

A statutory declaration that use of all water required for irrigation of lands in irrigation district was public use and resolution of district's board of directors that public interest and necessity required district's acquisition of water company's distribution system held sufficient to support trial court's finding in district's proceeding to condemn water company's property that district's acquisition thereof was for public use, notwithstanding water company's contract with investment company, from which water company acquired its irrigation works, to maintain such works and deliver water to investment company's riparian lands. Const. art. 14, § 1.

**3. Eminent domain ☞177**

An irrigation district may maintain action to condemn property of water company serving lands within district, without

joining owners of such lands as defendants, especially where district does not attempt to condemn such owners' property or water rights. Code Civ.Proc. § 1244, subd. 2.

#### 4. Eminent domain ⇨240

Where water company's property, sought to be condemned by irrigation district, constituted single unit, operated as indivisible whole and belonging to one owner, court's award to company of lump sum as compensation, without fixing values of various parcels of such property, was not reversible error as violating statute requiring court to assess value of each of different parcels of property taken. Code Civ.Proc. § 1248, subd. 1.

#### 5. Eminent domain ⇨205

In irrigation company's proceeding to condemn water company's property, district's experts' testimony, placing market value of property at \$20,000, and company's expert's testimony, placing value of over \$150,000 thereon, supported court's award of \$35,000, though such amount differed from evidence of value given by both sides.

#### 6. Eminent domain ⇨152(1)

In irrigation district's proceeding to condemn water company's property, judgment ordering payment to bank of entire amount loaned thereby to water company on security of pledge of its shares of an irrigation company's stock, instead of awarding bank only market value of such stock for application on loan, was not erroneous.

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Appeal from Superior Court, Kings County; W. L. Bradshaw, Judge.

Proceeding by the Stratford Irrigation District against the Empire Water Company and another to condemn property of the water company. Judgment for plaintiff, and defendant water company appeals.

Affirmed.

H. Scott Jacobs, of Hanford, for appellant.

Harris, Willey & Harris, Ronald B. Harris, and Dearing & Jertberg, all of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment condemning certain property of the Empire Water Company for the sum of \$35,000, approximately \$20,000 of which was ordered paid to the Security-First National

Bank of Los Angeles, and the balance to the Empire Water Company. We will refer to the Stratford Irrigation District as the District; to the Empire Water Company as the Company, and to the Security-First National Bank of Los Angeles as the Bank.

The District is an irrigation district organized and existing under the laws of the State of California. Its boundaries include the land to which water was conveyed by the system owned by the Company, which also owned 8⅝ shares of stock of the Lemoore Canal and Irrigation Company. This, with other stock was pledged to the Bank to secure a loan of approximately \$20,000.

The factual background of this litigation has been set forth at length in other cases so it will not be necessary to detail it here. See *Stratton v. Railroad Commission*, 186 Cal. 119, 198 P. 1051; *Quist v. Empire Water Company*, 204 Cal. 646, 269 P. 533; *Empire West Side Irr. Dist. v. Stratford Irr. Dist.*, 10 Cal.2d 376, 74 P.2d 248; *Braley v. Empire Water Co.*, 130 Cal. App. 532, 20 P.2d 75; *Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal.App.2d 61, 111 P.2d 957. It should be sufficient to say that in 1905 the Empire Investment Company owned a large tract of land in Kings County lying on both sides of the Kings River and riparian to it, as well as 8⅝ shares of stock in the Lemoore Canal and Irrigation Company, a mutual water company. The Empire Investment Company desired to subdivide and sell its land and organized the Empire Water Company to which it transferred all of its irrigation works and the Lemoore Canal and Irrigation stock in January, 1906. A contract was executed between the two corporations under which the Company agreed to maintain the irrigation and distribution works and deliver water to the lands for the sum of \$1 per acre per year. None of the riparian water rights were transferred to the Company. It has been held that under this contract the Company holds title to the Lemoore Canal and Irrigation Company stock in trust for the riparian owners. *Quist v. Empire Water Co.*, supra. All deeds to lands in this tract were made subject to the provisions of this contract under which the Company is still delivering water to the land owners.

The Company filed its petition with the Railroad Commission asking it to fix rates for delivery of water to the land owners.

The petition was granted but the order of the Commission was annulled in the case of *Stratton v. Railroad Commission*, supra [186 Cal. 119, 198 P. 1053]. It was there held: "That the water which the water company is engaged in distributing is not water devoted to a public use. The water taken is of two sorts; that taken under the right given by the ownership of the stock in the mutual water company, and that taken under the riparian right incident to the ownership of the land. It is settled in this state that water taken by a mutual water company and distributed to its stockholders is not taken for a public use, but that such a corporation is but the joint instrumentality of its stockholders, by means of which each diverts and has brought to him the water to which he in his own private right is entitled. See *Thayer v. California Development Co.*, 164 Cal. 117, 135, 128 P. 21. As to the water taken by the company under the riparian right, the case is even clearer. The water company did not have even the legal title to such right. It was expressly reserved to the land company and its successors in interest in the ownership of the land, and the water company was avowedly only an agent for making the diversion for the land owners under the riparian right which was carefully preserved to each. This right, of course, is of a purely private nature."

It is now urged that the District cannot condemn the works of the Company because it is established that those works are not dedicated to a public use which is the only purpose for which the right of eminent domain may be invoked. If this is true, it must be conceded that the judgment must be reversed. Sec. 1, Art. XIV, Const.; *McFadden v. Board of Supervisors*, 74 Cal. 571, 16 P. 397; *Thayer v. California Development Co.*, 164 Cal. 117, 128 P. 21; *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 P. 161.

This identical argument was made to this court on a former appeal (44 Cal.App. 2d 61, 111 P.2d 957, 960) and was thus disposed of:

"Eminent domain is the right of the people or government to take private property for public use, and the complaint must show that the use for which the property is to be taken is a public use, so declared by the legislature. *Northern Light, etc., Co. v. Stacher*, 13 Cal.App. 404, 109 P. 896; 10 Cal.Jur., p. 397, sec. 99. The legislature has declared in section 61b, Act 3854,

*Deering's General Laws 1937*, volume 1, page 1843, that '\* \* \* irrigation districts may acquire, by \* \* \* condemnation, the irrigation system, canals and works through which lands in such districts have been or may be supplied with water for irrigation, or other property necessary or proper for the purposes of the district \* \* \* or for the capital stock of any corporation owning such system or other property \* \* \* subject to any liens, encumbrances or obligations thereon \* \* \*.' See, also, sec. 15 of said act.

"It is therefore the general rule that an irrigation district may acquire by condemnation a system of canals and water works and may purchase or condemn an existing water system, in which case it takes subject to the rights of existing consumers, whether such rights exist by virtue of a contract or dedication of the system for use in connection with certain lands. 26 Cal.Jur. p. 404, sec. 632; *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.*, 111 Cal.App. 688, 296 P. 933.

"Section 17 of the act provides that 'The use of all water required for the irrigation of the lands of any district formed under the provisions of this act \* \* \* for \* \* \* beneficial uses, within such district, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act is hereby declared to be a *public use* \* \* \*.' (Italics ours.) It has been held that where the legislature declares a particular use to be a public use the presumption is in favor of its declaration and the courts will not interfere therewith unless the use is clearly and manifestly of a private character. *County of San Mateo v. Coburn*, 130 Cal. 631, 63 P. 78, 621; *Contra Costa Coal Mines R. R. Co. v. Moss*, 23 Cal. 323; 20 C.J., p. 551, sec. 38.

"Section 1241, subdivision 2, of the Code of Civil Procedure provides that before property can be taken it must appear that the taking is necessary to a use authorized by law, and it is further provided that when the board of directors of an irrigation district shall by resolution have found and determined that a public interest and necessity require the acquisition and that the property described in such resolution is necessary therefor, such resolution shall be conclusive evidence of the public necessity, except in the case of the taking of prop-



erty located outside of the territorial limits thereof. *County of Los Angeles v. Rindge Co.*, 53 Cal.App. 166, 200 P. 27; *San Benito County v. Copper Mountain Min. Co.*, 7 Cal.App.2d 82, 45 P.2d 428.

"However, the mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, as a matter of fact, the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use." See also, *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 77 P. 933; *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674; *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794; 10 Cal. Juris. 300, sec. 16, and cases cited.

We have before us in the evidence the resolution of the board of directors of the district which recites "that public interest and necessity requires the acquisition by said irrigation district of the distribution system of the Empire Water Company, which serves lands within said district, \* \* \*." The contract of January, 1906, is also before us. The trial court found that " \* \* \* the acquiring of the properties hereinbefore listed, and rights of way for ditches and structures appurtenant thereto, are for a public use and benefit." We are pointed to no evidence bearing on the question of public use other than the water contract of January, 1906. It seems that the Company is relying on this contract and the decision in the case of *Stratton v. Railroad Commission*, supra, to establish that the proposed taking is for a private and not a public use.

[1,2] Assuming, but not holding, that the foundations for the arguments of the Company are sound, and that delivery of riparian water to the land owners is a private use, it does not follow that the works sought to be condemned may not be put to a public use as well. The contract does not limit the use of the works and canals to the single purpose of delivering riparian water to the land owners. A mutual water company may have the right to conduct its water through the ditch of a public utility without affecting the public use of the ditch by the utility. *Wallace Ranch Water Co. v. Foothill Ditch Com-*

*pany*, 5 Cal.2d 103, 53 P.2d 929. There is nothing in the record to force the conclusion that the principal, if not the predominant use to which the works sought to be condemned will be put by the District, will be private and not public. Nor is there anything to require us to conclude that conveying riparian water to the land owners may not be a use merely incidental to the principal public use if it be finally held, when the matter is presented, that such incidental use is private. Under such circumstances the finding of the trial court that a public use is involved has sufficient support in the declaration of the legislature and the resolution of the Board of Directors of the District of the public use which are not overcome by the terms of the water contract.

The Company relies strongly on the case of *Bent v. Second Extension Water Company*, 51 Cal.App. 648, 197 P. 657. While that case may be factually similar to the instant case in some respects, there is nothing in it contrary to the conclusion we have just reached. Bent owned stock in the Second Extension Water Company which was appurtenant to his land. The Second Extension Water Company sold all its water, water rights and physical property to the Alpaugh Irrigation District which failed to furnish water to Bent, causing him damage. He recovered judgment for that damage which was affirmed on appeal. The instant case has not reached the point of determining the rights of the riparian owners, as against the District, under the water contract of January, 1906. That question cannot arise until the works of the Company are acquired by the District.

[3] It is argued by the Company that the District cannot maintain the action without joining all of the land owners receiving their riparian water through the works sought to be condemned. This argument is based on the provisions of subdivision 2 of section 1244 of the Code of Civil Procedure which provides that all known owners or claimants of property sought to be condemned must be named in the complaint as defendants. The same argument was made and held to be without merit on the former appeal. 44 Cal.App.2d 61, 111 P.2d 957. The further observation may be made that the District is not attempting to condemn any of the property or water rights of the individual land owners, so they should not have been joined

as defendants. No issue can arise in this action between them and the District.

[4] In describing the property sought to be condemned in the complaint, the District used 24 paragraphs, each describing a part of the property. The judgment awarded a lump sum of \$35,000 to the Company and the Bank, and the trial court did not fix the value of any of the various parcels described in the complaint, the findings and the judgment. It is argued that this constitutes reversible error, as it violates the provisions of subdivision one of section 1248 of the Code of Civil Procedure which requires the court to ascertain and assess the value of each parcel taken, if the property taken consists of different parcels.

The trial court found "That it is true that all of said properties described are integral parts of the whole of a diversion and distributing system which serves the lands of the Stratford Irrigation District with water, and although described by units are not severable from the whole." This finding is supported by evidence.

We believe this sufficiently answers this argument of the Company. If the property sought to be condemned constituted a single unit operated as an indivisible whole and belonging to one owner it might well be regarded as a single parcel and might have been described as such. The method of description employed should not be held to change this situation. If a right of way was sought to be condemned across a section of land belonging to one owner and operated as one tract, the fact that the complaint described the property as four quarter sections instead of one entire section would not compel the trial court to separately assess the value of the property taken in each quarter section.

[5] The Company argues that there is no evidence supporting the amount of the award. The evidence of the experts of the District placed the market value of the property to be condemned at \$20,000. They testified that the interest of the Company in the Lemoore Canal and Irrigation Company stock had no market value as it consisted of merely the legal title which was held in trust for the land owners. They were of the opinion that this stock would have had a value of about \$6,000 per share had it been free from the trust. The expert for the Company placed a value of upwards of \$150,000 on the property sought to be condemned. The trial court fixed

the value at \$35,000. As the amount awarded differed from the evidence of value given by both sides, it is argued there is no evidence supporting the award. This precise argument was rejected in Joint Highway Dist. No. 9 v. Railroad Co., 128 Cal.App. 743, 18 P.2d 413, 420, where it was said: "There is usually a sharp conflict in the evidence relating to market value in condemnation proceedings. The estimates given by the witnesses for the owners are ordinarily found to be in excess of the estimates given by the witnesses for the condemnor. In such cases the trial court, after weighing all of the evidence, frequently fixes the market value at a sum between the varying estimates of the witnesses for the respective parties. \* \* \* The fact that the trial court did not view the premises and did not fix the market value at a figure testified to by any witness is entirely immaterial."

[6] The Company argues that the trial judge should have found the market value of the Lemoore Canal and Irrigation Company stock and should have awarded the Bank no more than this value to be applied on its loan. This stock, and the stock of other companies, among which were 1991.80 shares of stock of the Company out of a total of 2000 shares issued, were pledged to secure the loan.

While it may be that there was originally some defect in the pledge to secure the debt, the Bank was an innocent party, and that defect is not urged here nor has it been urged in any of the other reported cases dealing with the affairs of the Company. All of the stock pledged was security for the entire debt, as was each share pledged. The stock of the Lemoore Canal and Irrigation Company could have been redeemed from the pledge only by payments of the entire debt. When the judgment is paid the lien of the Bank will extend to the money paid. Los Angeles, etc., Bank v. Bortenstein, 47 Cal.App. 421, 190 P. 850. The larger source of the supply of water used to irrigate the lands on the east side of Kings River, formerly a part of the Empire Ranch, lies in the ownership of this stock. While the naked legal title to this stock now in the Company may have no market value because of the trust, the right to use that water is of great value to the landowners, and might be lost were the pledge foreclosed. As the Bank had a lien on that stock to secure all of its debt, we can see no good reason

why its debt should not be paid in the manner provided in the judgment. *Los Angeles, etc., Bank v. Bortenstein, supra.*

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,  
concur.



58 Cal.App.2d 759

ROMERO et al. v. BREWER et al.  
Civ. 13982.

District Court of Appeal, Second District,  
Division 1, California.

May 25, 1943.

Hearing Denied July 22, 1943.

#### 1. Mines and minerals ⇨77

Evidence sustained judgment quieting title to realty in lessors who executed oil lease, as against lessees, on ground that lessees abandoned lease, as against contention that lessors ordered lessees off the land and would not permit them to continue work under the lease.

#### 2. Mines and minerals ⇨73

Right of lessee under oil lease constitutes "profit a prendre" which vests in lessee an "incorporeal hereditament", a "present estate", an "interest in land" which is a "chattel real" if it is to endure for years.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Real", "Incorporeal Hereditament", "Interest in Land", "Present Estate" and "Profit a Prendre".

#### 3. Mines and minerals ⇨73

Oil lease which by its terms was to endure for years was a "chattel real" and an "incorporeal hereditament" and the real property rule concerning abandonment of corporeal hereditaments was inapplicable to it.

#### 4. Mines and minerals ⇨77

Title to oil leasehold may be lost by abandonment.

#### 5. Mines and minerals ⇨77

In order for there to be an "abandonment" of oil lease, there must be an inten-

tion to abandon and although such intention may be inferred from circumstances, mere inactivity without more is insufficient basis for such an inference.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

#### 6. Mines and minerals ⇨77

An abandonment will be more readily found in case of oil and gas lease than in most other cases.

#### 7. Mines and minerals ⇨78(3)

A clause in oil lease requiring lessors to give 60 days' written notice of lessees' failure to comply with terms of lease, before forfeiture of the lease, is for the benefit of the lessee who in good faith goes forward in compliance with terms of lease and a lessee who has been in default in major covenants of lease to extent that they show abandonment may not insist as matter of law that under all circumstances such a notice must be given.

#### 8. Mines and minerals ⇨78(3)

Failure of lessors to comply with provision of oil lease requiring 60 days' written notice of failure to perform to be given to lessees in order to authorize forfeiture of lease, did not preclude finding of abandonment of the lease by the lessees who were in default in all the major covenants of the lease.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Alexander Romero, sometimes known as Alex S. Romero and another, against Curtis I. Brewer and wife to quiet title to realty. From an adverse judgment, defendants appeal.

Affirmed.

Joseph A. Ball and Louis N. Whealton, both of Long Beach (Kenneth Sperry, of Long Beach, of counsel), for appellants.

John A. Galvin, of Fillmore, and Henry L. Knoop, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

The two plaintiffs in this case are father and son. They are owners of some 480 acres of land located in a mountainous section of Los Angeles County near the City of Newhall. While the nature of plaintiffs' ownership is not essential to this decision, it may be said that the



father secured title to the property under the homestead laws of the United States, and thereafter by deed conveyed it to his son in consideration of promises by the son to support the father, to pay the expenses of his burial, and to permit him during his lifetime to live upon the property.

September 13, 1937, the plaintiffs as lessors entered into an oil lease with four individuals named therein as lessees. Three of these individuals quitclaimed to the plaintiffs all of their right, title, and interest in the land involved, and are not parties to the pending litigation. The fourth lessee, and his wife, are the parties defendant.

Such covenants and agreements in the lease as are necessary to an understanding of the issues involved are as follows:

1. The lessees are granted the right to drill, operate, develop and remove petroleum and its products from the demised premises, together with necessary rights of way, and necessary water to be developed by the lessees.

2. The lessees covenant to "commence drilling or operations for sinking a well" within \_\_\_\_\_ days. In reducing the agreement to writing the parties used a printed oil lease form, which has been designated in one of the briefs as a "Store lease". Some of the blanks in the form were filled in, others were not, and the drilling covenant was left blank as to time. However, there is testimony in the record which will support the conclusion that the lessees agreed to commence drilling, or operations for sinking a well, within ninety days from the date of the lease.

3. If oil in paying quantities was not obtained within twelve months, the lease was to be cancelled and surrendered to the lessors.

4. Upon failure of the lessees to comply fully and fairly with each of the conditions of the lease "sixty days after notice in writing so to do" by the lessor to the lessee, all rights thereunder are to terminate and be forfeited.

5. The term is five years from the date thereof, "to be extended from term to term", with the right to retain producing wells 20 years from date of expiration of the lease.

Upon the delivery of the lease, the lessees went into possession of the leased premises. During 1938 they built between

300 and 400 yards of roadway, and hauled some secondhand machinery and equipment upon the lease and to a point approximately one-quarter mile away from a proposed drilling site; but such machinery and equipment were wholly inadequate to drill either a water well or an oil well, and of no substantial value. During the summer of 1938 the lessees hauled to the drilling site some miscellaneous pieces of used lumber to be used to build a derrick. In February, 1939, the lessees obtained from the Board of Public Works of the County of Los Angeles a permit to build a derrick.

There was no water on the land, an adequate supply of water was essential for oil-drilling purposes, but lessees never commenced a water well. No permit was obtained from the State Mining Bureau to drill an oil well upon the premises; no derrick was ever erected; no oil well was ever drilled or commenced; and no oil was obtained in any quantity. Since March, 1939, no lessee did, or attempted to do, anything by way of performance of any covenant or condition in the lease. The complaint was filed February 24, 1941.

The trial court found that the lease had been abandoned and judgment followed quieting title in the plaintiffs.

From this judgment defendants lessee have appealed. They contend that (1) the evidence is insufficient to support the finding of abandonment; and (2) in any event written notice of default and demand for compliance was necessary to determine the interest in the real property acquired by the defendants under the lease.

[1] There is substantial evidence to support the finding of the fact of abandonment. There was testimony to the effect, and appellants' brief argues the point, that one of the plaintiffs ordered the lessees off the land, and would not permit them to continue work under the lease. There was testimony to the contrary, and on this issue the trial court found against the defendants.

The second contention may be summarized as follows: The lease contained a clause providing that before lessees' rights could be forfeited, sixty days' notice in writing of the failure on their part to comply fully and fairly with any of the terms of the lease was to be given to them by lessors. It was stipulated at the trial, and the court found, that no notice was given by lessors to lessees of any default.

This being the case, defendants argue that the execution of the lease immediately vested in them an interest in the land which could not, as a matter of law, be abandoned; that legal title to a corporeal hereditament cannot be abandoned. 1 Corpus Juris 10; Kern County Land Co. v. Nighbert, 75 Cal.App. 103, 241 P. 915; Foss v. Central Pacific Railroad Co., 9 Cal.App. 2d 117, 49 P.2d 292.

This contention earnestly presented calls for at least some detailed consideration. It is to be remembered that in the lease there was a covenant to commence drilling an oil well within ninety days from its date, which concededly was not performed by the lessee. There was also a covenant to produce oil in paying quantities within one year from the date of the lease, which also concededly was not performed by the lessee. Notwithstanding the violation of these covenants, it is contended that because of the estate created by the lease itself, there is only one way in which lessors may quiet their title; i. e. by giving the lessee written notice of default of the terms of the lease and an opportunity for sixty days thereafter to correct the same.

[2] For a determination of this question fortunately there is a good point of beginning in *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. Whatever the law of California may have been before, that case settled the status of the estate granted by an oil lease. This is concisely defined at page 122 of the reported decision [43 P.2d at page 794]: "This profit a prendre vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real if it is to endure for years."

[3] The lease here in question by its terms is to endure for years. Therefore, it is a chattel real, an incorporeal hereditament, and the real property rule as to abandonment of corporeal hereditaments is not applicable to it. This conclusion is supported by the recent case of *La Laguna Ranch Co. v. Dodge*, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. In that case our Supreme Court held that the lessee of an oil lease who had granted to third persons over-riding royalties could terminate the estate of such grantees by quitclaiming the lease—a view which is directly opposed to the theory of ownership advanced by defendants in this case.

Abandonment of oil leases by lessees has been approved, either tacitly or by di-

rect holding in all the California cases in which the subject has been under consideration.

[4, 5] The text in 8 Cal.Jur.Supp. 733 (and see cases cited in the footnotes) states the rule:

"Abandonment.—While a fee-simple title to real property cannot be lost by abandonment, it seems to be settled that title to an oil and gas leasehold may be lost in that way. As one of our appellate courts has observed, 'Such a lease may be abandoned, and when once abandoned by the lessee, he cannot thereafter claim or enforce any right thereunder without first securing the consent of the lessor or a renewal of the lease.' But of course non-user alone does not constitute an abandonment. In order that there be an abandonment, there must be an intention to abandon; and while such an intention may be inferred from the facts and circumstances of the case, mere inactivity, without more, is a wholly insufficient basis for any such inference."

[6] And "Abandonment will be more readily found in the case of oil and gas leases than in most other cases." *Hall v. Augur*, 82 Cal.App. 594, 256 P. 232, 234.

These principles are supported by the recent cases of *Rice v. Lee*, 44 Cal.App.2d 909, 113 P.2d 235, and *Rehart v. Klossner*, 48 Cal.App.2d 40, 119 P.2d 145. In the latter case the authorities are cited, considered, and applied.

[7, 8] The purpose of the notice clause to protect lessees from forfeiture of oil leases is well known and understood in the oil industry. It is for the benefit of the lessee who in good faith goes forward in compliance with the terms of his lease. For instance, it would be manifestly unjust and unfair to forfeit the leasehold interest of such a lessee because of some default in the terms of the lease suffered or permitted by his agents or employees and without his knowledge, especially upon the discovery of oil and gas in paying quantities upon the leased premises. It would be equally unjust to allow a lessee who has been in default in the major covenants of an oil lease to the extent that they show abandonment, to insist, as a matter of law, that under all circumstances such a notice must be given. Such construction of its effect would inevitably, finally defeat the purpose of the notice clause and the protection which it gives the bona fide lessee.

To avoid the injustice in the latter instance, in *Stetson v. Orland Oil Syndicate, Ltd.*, 42 Cal.App.2d 139, at page 142, 108 P.2d 463, the District Court of Appeal held that upon the failure to drill a well the lease terminated by its own terms; and, in any event, that notice was waived when the lessees contested the plaintiffs' quiet title action upon the theory that they were not in default under the terms of the lease. Also see *Calhoma Oil Co. v. Conniff*, 207 Cal. 648, 279 P. 771. To avoid the injustice in the first instance, in such cases as *Scheel v. Harr*, 27 Cal.App. 2d 345, 80 P.2d 1035, and *Sandrini v. Branch*, 32 Cal.App.2d 707, 90 P.2d 593, where the lessee had in good faith commenced drilling and had made a considerable investment, it was held that the lessee was entitled to the protection of the notice clause.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



58 Cal.App.2d 851

**WOOD et al. v. EMIG, Sheriff, et al.**  
**VANDERVOORT et al. v. WOOD et al.**  
Civ. 12309.

District Court of Appeal, First District,  
Division 1, California.

May 28, 1943.

Hearing Denied July 26, 1943.

#### 1. Deeds ⇨54

A deed is ineffective until delivery.

#### 2. Homestead ⇨47

Validity of declaration of homestead by parents was not affected by their previous execution of deed to premises to daughter, which deed was not delivered.

#### 3. Homestead ⇨210

Effect of filing declaration of homestead is question for courts of county in which property is located. Const. art. 6, § 5; Code Civ.Proc. § 392.

#### 4. Homestead ⇨81

Generally, a fee simple in land is not necessary for establishment of a homestead.

#### 5. Venue ⇨4

Character of action and judgment generally determine whether action is local or transitory so as to fix place of trial.

#### 6. Venue ⇨21

Generally, transitory actions are tried in county where defendant resides. Code Civ.Proc. § 395.

#### 7. Venue ⇨5(2, 3)

Subject to rules of change of venue, actions to quiet title, for recovery of interest in realty, for foreclosure of a lien or for determination of any such right or interest, must be commenced where land is situated. Const. art. 6, § 5; Code Civ. Proc. § 392.

#### 8. Homestead ⇨210

Determination of rights of homesteaders should be heard in county where homestead is situated. Const. art. 6, § 5; Code Civ.Proc. § 392.

#### 9. Homestead ⇨210

Order of superior court of Siskiyou county purporting to determine validity of declaration of homestead on realty in Santa Clara county was invalid. Const. art. 6, § 5; Code Civ.Proc. § 392.

#### 10. Judgment ⇨707

Where parents conveyed their homestead property in Santa Clara county to daughter, decision of Siskiyou county superior court in subsequently instituted proceeding in which daughter was not a party that declaration of homestead was invalid was not binding on daughter. Const. art. 6, § 5; Code Civ.Proc. § 392.

#### 11. Homestead ⇨57(3)

In action to declare rights of parties under declaration of homestead and alleged judgment lien, evidence sustained finding of valid declaration of homestead.

#### 12. Pleading ⇨349

Under rule that a court is not bound to find in accordance with pleadings alleging an approximate date of delivery if evidence shows true date to be otherwise, the fact that pleadings indicated that deed to parents' Santa Clara homestead property was delivered a few days before its recordation and subsequent to recordation in Santa Clara county of Siskiyou county judgment against parents did not require judgment on pleadings for judgment creditors establishing judgment lien on theory



that homestead was abandoned and lien attached. Civ.Code, §§ 1039, 1053, 1243.

### 13. Homestead ⚡175

Judgment lien attaches against judgment debtors' homestead property upon abandonment of homestead only if judgment debtors remain owners of property. Civ.Code, § 1243.

### 14. Fraudulent conveyances ⚡52(1)

Transfer by judgment debtors of homestead property to judgment debtors' children did not prejudice judgment creditors, since judgment creditors could not reach property regardless of transfer and could not contend that conveyance was void as attempt to divest title out of debtors but was valid in destroying homestead right. Civ.Code, §§ 1039, 1053, 1243.

### 15. Appeal and error ⚡1056(1)

In action to declare rights of judgment creditors and debtors under debtors' declaration of homestead, any error in refusing to admit testimony of debtor in another proceeding in different county which would be merely matter of impeachment was not prejudicial.

### 16. Pleading ⚡291(1), 349

In action to declare rights of parties under plaintiffs' declaration of homestead, where judgment in former proceeding in another county declaring homestead invalid was attached as exhibit to answer and plaintiffs failed to file contravening affidavit, such failure established genuineness and due execution of judgment but did not prove matters adjudicated so as to entitle defendants to a judgment on pleadings. Code Civ.Proc. § 448.

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Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by J. Henry Wood and another against William J. Emig, as Sheriff of the County of Santa Clara, State of California, and others for declaratory relief to determine rights of parties under plaintiffs' declaration of homestead and to quiet title, wherein defendants I. P. Vandervoort, F. M. Shaw, C. H. Jordan, C. H. Jordan, trustee, and A. L. Crawford, special administrator of the estate of G. D. Krause, deceased, cross-complained against plaintiffs and Dorothy M. Ross and Henry Carroll Wood for a declaration that homestead was invalid and that a judgment

against plaintiffs was first lien on premises. From a judgment for cross-defendant Dorothy M. Ross, defendants and cross-complainants appeal.

Affirmed.

A. L. Crawford and Ralph Bancroft, both of San Francisco, for appellants.

Chester E. Ross, of Hollister, for respondent, Dorothy M. Ross.

WARD, Justice.

This is an appeal by defendants and cross-complainants from that part of the judgment rendered in this action by which Dorothy M. Ross is decreed to be the owner of the parcel of land involved herein, free and clear of the lien of a judgment obtained by certain of the defendants and which they sought to execute upon said real property.

J. Henry Wood and Margaret Wood, his wife, plaintiffs, acquired title to the property involved in 1925; they made it their home and, except for periods spent in Santa Cruz County and at a mining location in Siskiyou County, lived there continuously until April 1, 1940. During such periods as they were absent from the home, located in Palo Alto, their household furnishings remained there. While in Siskiyou County they lived in a cabin on their mining location, having taken with them only such personal effects as were necessary to their temporary stay. All of the time from June 1938 until April 1, 1940, they lived in the home in Palo Alto. In the meantime, in September of 1938, Mr. Wood suffered a stroke of paralysis and from that time was unable to perform any work. On June 29, 1939, they filed a declaration of homestead on the property. In April of 1940, their financial condition having become such that they felt obliged to rent their home in order to "have something to live on," they moved to a small apartment in Santa Cruz for two months, and from there moved to the cabin in Siskiyou County. There is testimony that in September 1940, Mrs. Wood delivered to her daughter, Dorothy M. Ross, a deed to the Palo Alto property, in which the latter and a son of plaintiffs were named as grantees, the son later conveying his interest to his sister. The deed was not recorded until December 19, 1940. In the meantime, the sheriff of Santa Clara County, who is one of the defendants herein, levied a writ of execution on the Palo Alto property, including the income therefrom, in execution of a judgment obtained in Sis-

kiiyou County, and recorded in Santa Clara County on October 24, 1940.

There is evidence that the deed to plaintiffs' children had been made in 1936. Plaintiffs testified in that regard that at the time of its execution, they were doing a great deal of dangerous mountain driving and "we wanted that deed written in case anything would happen to us, they would find that deed among our papers, that property would go to our two children." It had, however, remained in the possession of plaintiffs, Mrs. Wood testifying that "wherever we [she and her husband] were, the papers were."

Shortly after the service of the writ of execution on the tenant of the Palo Alto property by which the rental due was attached, and on a local bank for a small amount on deposit in plaintiffs' names, plaintiffs served on the sheriff an "Affidavit on Claim of Exemption, and Demand for Release of Exempt Property," claiming all rentals from the homesteaded property to be exempt, Civil Code, sec. 1265, and demanding the release of the moneys levied upon. Thereafter the plaintiffs in the Siskiyou County action served upon plaintiffs and upon the sheriff a "Counter Affidavit to Claim of Exemption by Defendants \* \* \* in Opposition to Demand for Release of Property claimed exempt," claiming therein that the declaration of homestead was false, fraudulent and untrue in that plaintiffs did not reside upon the premises in question at the time of the declaration.

This action was brought against the sheriff and the creditors who had obtained the judgment against plaintiffs, the prayer of the complaint being to quiet plaintiffs' title to the real property and to enjoin the defendants from asserting any claim thereto by reason of their judgment. A general demurrer to the complaint was sustained. Thereafter an amended complaint for declaratory relief was filed, the object of which was to determine the rights of plaintiffs under the declaration of homestead and also to quiet title to the real property. The defendants answered, asserting a first lien upon said property; they also alleged by special defense that the issue of a valid homestead thereon had been previously determined in the Siskiyou County case, wherein the claim of exemption had been heard and denied, and that the issue was thus *res judicata*. At the same time they filed a cross-complaint in which they joined

the son and daughter of plaintiffs herein, alleging that they claimed some interest in the property by virtue of the deed from plaintiffs. They prayed that the homestead be declared invalid and that the judgment in the Siskiyou County case be declared a first lien on said real estate. Cross-defendant Henry Carroll Wood, plaintiffs' son, defaulted. Cross-defendant Dorothy Ross, their daughter, joined with plaintiffs in the answer to the cross-complaint, concluding with the prayer: "Wherefore, these plaintiffs, including said Dorothy M. Ross, pray that the defendants take nothing by said cross-complaint, and that the plaintiffs have judgment as set forth in their amended complaint on file herein, saving and excepting that said Dorothy M. Ross be permitted to join with said plaintiffs therein, to the extent of establishing her sole ownership therein, as shown by the records of the title thereto as the same exists at the present time." Judgment was rendered in favor of cross-defendant Dorothy M. Ross, decreeing that she was the owner of the real estate and enjoining the defendants, now appellants, from in any manner asserting any claim thereto.

[1,2] The deed to the children of plaintiffs executed in 1936 could have no effect until its delivery; it could have been destroyed at any time, and the declaration of homestead in 1939 is further evidence that the parties still considered the property theirs, so that the declaration of homestead was lawful in case all other requirements were met. The judgment was given in the Siskiyou County case January 29, 1940 about six months after the declaration of homestead (June 29, 1939); it was recorded in Santa Clara County October 24, 1940 over a year after the declaration of homestead, but prior to the recordation of the deed to the daughter, although she claimed delivery thereof in September of 1940 and the court so found.

The main questions on appeal are (1) when the homestead was removed by deed to the daughter, recorded December 19, 1940, was the judgment recorded in the meantime a lien on the property, (2) was abandonment of the homestead proven, and (3) is the doctrine of *res judicata* applicable to the facts.

[3] The denial of the above-mentioned claim of exemption by the superior court in Siskiyou County purported to determine that J. Henry Wood and Margaret Wood had no valid homestead rights to the prop-

erty in Palo Alto. Although the original issue in Siskiyou County was a claim to money, the ultimate issue was the validity of the homestead, and whether a judgment against plaintiffs could be satisfied therefrom. The latter issue is involved in the present appeal. In both instances if the homestead is valid, the property is not subject to execution. The particular question in this regard is whether a court other than that of the county wherein the homestead is located has the power to hear and determine the question of its validity. All actions for the enforcement of liens upon real property shall be commenced in the county wherein such property is situated. Calif. Const. Art. VI, sec. 5; Code Civ.Proc. § 392. The effect of filing a declaration of homestead is a question for the county in which the property is located. It is of local importance whether or not spouses who hold property inviolate against claims of creditors seeking to remove an exemption thereon, should be entitled to a hearing in the county of their residence, which county may be forced to assume their care in the event the homestead is declared invalid.

[4] Appellants contend that the matter before the Siskiyou court was transitory and not local. This contention is primarily based upon the following language in *Arighi v. Rule & Sons, Inc.*, 41 Cal.App. 2d 852, 855, 107 P.2d 970, 972: “\* \* \* the homestead right is not an estate in the land, but a mere privilege of exemption from execution of such estate as the holder occupies.” The court there was simply stating the general rule that “a fee simple in the land is not necessary for the establishment of a homestead,” a matter foreign to the problem presented in the present case.

[5-7] The distinction between a local and a transitory action is not always easily ascertainable. The character of the action and judgment generally determine its classification. *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931. Transitory actions are generally tried in the county where the defendant resides. Code Civ.Proc. § 395. In the Siskiyou County case the proceeding was in enforcement of a judgment by execution, in effect the satisfaction of a lien against homestead real estate in another county. Subject to the rules of change of venue, actions to quiet title, for recovery of an interest in real estate, for the foreclosure of a lien, or for the determination

of any such right or interest, must be commenced where the land is situated. Calif. Const. Art. VI, sec. 5; *Maguire v. Cunningham*, 64 Cal.App. 536, 222 P. 838; *Coley v. Hecker*, 206 Cal. 22, 272 P. 1045; *Urton v. Woolsey*, 87 Cal. 38, 25 P. 154; *Murphy v. Superior Court*, 138 Cal. 69, 70 P. 1070; *Bartley v. Fraser*, 16 Cal.App. 560, 117 P. 683; *Morrissey v. Morrissey*, 191 Cal. 782, 218 P. 396; *Eckstrand v. Wilshusen*, supra. In *Cohen v. Hellman Commercial T. & S. Bank*, 133 Cal.App. 758, 24 P.2d 960, 963, an action for an accounting and for the termination of a trust and the reconveyance of real property, a transitory and local action could well be heard in a county other than where the property was situated in the absence of a motion for change of venue. In that case “no lien was sought to be enforced.”

[8,9] The determination of the rights of homesteaders should be heard in the county where the homestead is situated. In the *Matter of Estate of James*, 23 Cal. 415; *Votypka v. Valentine*, 41 Cal.App. 74, 182 P. 76; *Rogers v. Cady*, 104 Cal. 288, 38 P. 81, 43 Am.St.Rep. 100. “When it appears that the court has no jurisdiction, it has no power to proceed in any manner, but should dismiss the action.” *Estate of Palmieri*, 120 Cal.App. 698, 700, 8 P.2d 152, 153. The question of jurisdiction may be raised at any period before final disposition of the litigation. The order of the superior court of Siskiyou County was without legal effect. *People v. Davis*, 143 Cal. 673, 77 P. 651; *Peters v. Anderson*, 113 Cal.App. 158, 298 P. 76. It may be assumed that such court had jurisdiction to render the money judgment and, by following the usual procedure, make it effective in another county, but it did not have jurisdiction to determine homestead rights to real estate located in another county. *Votypka v. Valentine*, supra. “\* \* \* when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.” *Rodman v. Superior Court*, 13 Cal.2d 262, 269, 89 P.2d 109, 112. In *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 291, 109 P.2d 942, 948, 132 A.L.R. 715, the court said: “Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction.”



[10] In addition to the above it should be noted that at the date of the hearing in Siskiyou County of defendants' (plaintiffs herein) motion for claim of exemption, Dorothy M. Ross was the owner of the property. She was not a party to the action, nor was she represented at such hearing; hence the determination of the homestead rights of her father and mother was not binding upon her. This conclusion eliminates the necessity of considering appellants' claim of *res judicata*.

[11] The court found "That said real property is now, and at all of the times herein mentioned was, improved with a family style dwelling house, situated in the residential area of said City of Palo Alto; that said dwelling house was the family home of plaintiffs and their family from 1925 until about the year 1935; that for a period of approximately two years the plaintiffs resided in Siskiyou County and in Santa Cruz County; that beginning on or about the 20th day of June, 1938, and continuously thereafter until the 30th day of March 1940, the plaintiffs lived in the residence upon said real property; that during said last mentioned period they occupied said residence and made their home here, and that during said period said real property was their only place of domicile; that said residence thereon was actual, bona fide, and continuous; that while said plaintiffs were residing upon said premises as aforesaid, and on or about the 26th day of June, 1939, they executed a Declaration of Homestead, which was in due and proper form, and which was duly recorded on June 29th 1939 in Volume 933 of Official Records, at page 565, in the office of the Recorder of said County of San Benito [Santa Clara], wherein said real property was claimed as a Homestead by said plaintiffs; that said plaintiffs at the time of making said Declaration of Homestead had no other Homestead upon any other property." While there is some conflicting evidence, particularly as to the voting registration of the parties, there is ample evidence to sustain the findings.

Considerable attention is given to the date of the delivery by the parents of the deed to the daughter Dorothy M. Ross. Margaret Wood, referring to the deed, testified:

"Q. Can you state when it was delivered to someone other than yourself and to whom it was delivered? A. It was delivered to my daughter in September.

"Q. Of what year? A. I am trying to think of that year. September of 1940."

Mrs. Dorothy M. Ross testified:

"Q. Was it delivered to you personally? A. To me personally, yes. \* \* \*

"Q. Are you able to state the approximate time or date of the delivery of this deed to you? A. Yes, I would say it was the first week in September.

"Q. Of what year? A. 1940."

[12] Appellants contend that the deed to Dorothy Ross and her brother effected an abandonment of the homestead. Civil Code, §§ 1039, 1053, 1243. In support thereof certain allegations in the pleadings are emphasized, particularly that the deed was delivered a few days before its recordation and subsequent to the recordation of the Siskiyou County judgment in Santa Clara County. Upon this basis appellants attempt to maintain the contention that they should have had judgment on the pleadings. A court is not bound to find in accordance with the pleadings alleging an approximate date of delivery if the evidence shows the true date to be otherwise. The difference in the pleading and the finding is not prejudicial to appellants in view of the holding in *Palen v. Palen*, 28 Cal.App.2d 602, 83 P.2d 36, which will be referred to later.

[13,14] If there had been an abandonment of the homestead, any judgment lien in appellants' favor would attach only in the event the judgment debtors were still the owners of the property. By transferring the property to their children, plaintiffs put defendants in no different position than before the transfer took place. While the property was homesteaded in plaintiffs' favor, the defendants could not reach it for the satisfaction of their judgment—so it is immaterial to the creditors whether or not the debtors retained or transferred the property. In *Palen v. Palen*, supra, 28 Cal.App.2d pages 605, 607, 83 P.2d page 37, the court said: "Considerable emphasis is placed by applicant upon the contention that the homestead was abandoned by the execution of the deed to Edmonston, which the court found created a constructive trust. Section 1243 of the Civil Code provides that a homestead may be abandoned only by a declaration of abandonment or by a grant thereof, and section 1053 of the Civil Code declares that a grant is a transfer in writing

and that a transfer (sec. 1039, Civ.Code) is an act by which the title to property is conveyed by one living person to another. It is conceded there was no abandonment of homestead filed, so appellant must rely upon the conveyance to Edmonston to establish such abandonment. The question then is, was the deed referred to a grant, and did it operate to transfer the title to the property from the grantors to the grantee? We are convinced that it did not convey such an interest as to create such abandonment. \* \* \* Having in mind the tendency in California is to protect the homestead, the power of a creditor to attack the homestead by forced sale must be strictly limited to the instances specified in the law, in order that the humane objects which the legislature intended by its enactment shall be effected." The Palen case quotes with approval 13 Ruling Case Law, sec. 118, p. 660, as follows: "The reasons usually given for negating the liability of the homestead which has been fraudulently conveyed are substantially as follows: A homestead is not liable to seizure under execution, and therefore a conveyance of it is a question in which the creditor has no interest. It is not liable before conveyance to the claim he asserts; and the conveyance, though fraudulent, puts the creditor in no better condition than he was in before. If the conveyance is set aside as fraudulent this leaves the homestead as if no attempt had been made to convey it, so far as any claim can be asserted by the creditor. It is void as to him to all intents and purposes. He cannot be heard to say in one and the same breath that the conveyance is void in its attempt to divest title out of the debtor, but is valid in destroying the homestead right. He cannot claim both under and against the conveyance; under it as a valid parting with the homestead right; against it as an abortive effort to pass title out of the debtor. It must stand, as to him, as if no conveyance had been attempted." In view of the above, appellants were not prejudiced by failure to make a direct finding on abandonment.

[15] The claim that the court erred prejudicially in refusing appellants the right to introduce testimony of Mr. Wood taken in the Siskiyou County proceedings is without merit. The effect of such testimony would be, not to establish the date of delivery, but merely a matter of im-

peachment. The testimony would be of little avail in view of the holding in *Palen v. Palen*, supra.

[16] Appellants cite *Johnston v. Ota*, 43 Cal.App.2d 94, 110 P.2d 507, to the effect that the genuineness and due execution of a judgment are established if a copy thereof is attached to the answer and no affidavit is filed under Code Civ.Proc. § 448. That case does not substantiate appellants' contention that such rule fixes a right to judgment on the pleadings. At page 98 of 43 Cal.App.2d, at page 510 of 110 P.2d, the court said: "The fact that the judgment was attached as an exhibit to the answer, merely establishes its genuineness and due execution. Code Civ. Proc., § 448. It does not prove the matters adjudicated by the judgment of dismissal."

The other contentions of appellants connected directly or indirectly with the foregoing claims of error are without merit. Further discussion would unduly lengthen this opinion without benefit to appellants.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



58 Cal.App.2d 793

QUETIN et al. v. CAUBU.

Civ. 6822.

District Court of Appeal, Third District,  
California.

May 25, 1943.

#### I. Appeal and error ⇨882(17)

A defendant, specifically waiving findings by court and notice of entry of judgment in parties' written stipulation, "estopped" himself from taking advantage of statutory provisions for correction of court's fact findings and conclusions of law and cannot complain of them on appeal from judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

**2. Appeal and error** ⇨931(1)

Where defendant and cross-complainant, dissatisfied with amount of judgment in his favor, made no motion for new trial, on which trial court could have set aside its findings and judgment, if mistaken in its previous view of evidence or application of law thereto, evidence sufficient to support trial court's ultimate conclusion must be assumed by appellate court on appeal by defendant and cross-complainant on judgment roll alone. Code Civ.Proc. § 662.

**3. Appeal and error** ⇨219(2)

A defendant and cross-complainant, specifically waiving his statutory right to demand fact findings by trial court in parties' written stipulation, "waived" right to object in such court to any uncertainty or inconsistency in court's findings and cannot raise such questions for first time on appeal from judgment in his favor for unsatisfactory amount.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

**4. Appeal and error** ⇨931(1)

The trial court's fact findings will be liberally construed so as to support judgment predicated thereon and all proper inferences will be indulged in order to uphold decision, on appeal on judgment roll alone, subject to restriction that facts contradicting facts found by trial court cannot be inferred.

**5. Appeal and error** ⇨907(3)

In action to quiet title to mining lands, District Court of Appeal, on appeal on judgment roll alone by substituted defendant and cross-complainant from judgment in his favor for unsatisfactory amount, must assume in support of judgment that larger sum, found by trial court to have been collected by plaintiffs as rents and issues, represented gross receipts from operation of mine, so as to require affirmance of judgment as indicating that sufficient evidence was introduced to show that plaintiffs and cross-defendants were entitled to offsets for necessary expenditures in operation of mine or disbursements for taxes, assessments, and maintenance or improvements of property.

**6. Mines and minerals** ⇨51(5)

The measure of damages for trespass on mining claim is amount which will

compensate owner thereof for all detriment proximately caused by trespass, in absence of oppression, fraud, or malice, so that measure of damages for party's invasion of another's mine as result of inadvertence or honest mistake is value of mineral extracted by such party, less cost of mining and milling.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by A. W. Pioda against Joseph Fassler and others to quiet title to mining lands, in which named defendant filed a cross-complaint to set aside tax deeds to plaintiff and remove clouds on defendant's title. Fred R. Drinkhouse, as trustee of named defendant's bankrupt estate, was substituted as defendant and cross-complainant, and W. P. Caubu was substituted for such trustee as defendant and cross-complainant, and Henri J. Quetin was substituted as plaintiff and cross-defendant. From a judgment for defendant and cross-complainant Caubu against substituted plaintiff and cross-defendant in an unsatisfactory amount, defendant and cross-complainant Caubu appeals.

Affirmed.

Thomas T. Califro, of San Francisco, for appellant.

Jay Monroe Latimer, of San Francisco, for respondents.

PEEK, Justice.

The defendant and cross-complainant W. P. Caubu seeks modification of a portion of a judgment in his favor and against the plaintiff and cross-defendant Henri J. Quetin. The appellant specifically asserts that this appeal is limited solely to the judgment roll (therefore no evidence introduced at the trial is before us), that the judgment is not sustained by the findings in that the conclusions of law are not sustained by nor do they conform to the findings. No complaint is made of the issues of fact.

The action to quiet title was commenced by plaintiff A. W. Pioda as the alleged owner of certain mining lands situated in Calaveras County. One of the defendants, Joseph Fassler, answered, denying the ownership of Pioda, and by his cross-complaint claimed ownership in himself, alleging that the claim of plaintiff was



based solely on void tax certificates and deeds previously issued by the tax collector of said county on March 28, 1933, for non-payment of taxes levied in the year 1923. Fassler also proffered payment of whatever sums the court found to be due plaintiff under the tax deeds so purchased, and prayed to have such deeds declared void, the clouds removed, and for general relief. The plaintiff failed to answer said cross-complaint, and his default was duly entered. The cause was tried and submitted. Following the submission, the motion of Fred R. Drinkhouse as trustee of the bankrupt estate of Joseph Fassler, to be substituted in the place and stead of Joseph Fassler, was granted, and the cause was reopened for the purpose of taking additional evidence. In the interim between trials, W. P. Caubu, who had purchased all of the right, title and interest of the bankrupt estate of Joseph Fassler, was, upon waiver of notice by all parties, ordered substituted as defendant and cross-complainant in place of the said defendant and cross-complainant Drinkhouse; and by an ex parte order Henri J. Quetin was substituted as plaintiff and cross-defendant in place and stead of the said A. W. Pioda. Upon leave of court an amended and supplemental answer and cross-complaint was filed by the said W. P. Caubu. Neither A. W. Pioda nor Henri J. Quetin answered, and their defaults were duly entered. The cause then regularly came on for rehearing and was duly submitted.

Thereafter the trial court filed what is designated as "Findings and Judgment" although all of the parties had previously executed and filed with the court a written stipulation wherein they specifically waived findings and notice of entry of judgment. In said judgment rendered in favor of appellant and against all other parties to the action, the court awarded appellant judgment against plaintiff and cross-defendant Henri J. Quetin, conditioned, however, that Caubu reimburse plaintiffs and cross-defendants Pioda and Quetin for the expenses incurred in their attempt to secure title to the property.

[1] Appellant now presents to this court certain objections predicated upon what he prefers to consider as proper findings of fact and conclusions of law as set forth in the document previously filed by the court, and requests modification of a portion of the judgment. In particular he assails the amount of the award made to

him, contending that he is entitled to the total sum of \$70,292.11, which apparently was found by the trial court to be the gross recovery made by plaintiffs and cross-defendants from their operation of the mine. The judgment as entered by the court was in the much lesser sum of \$4,915.37.

In support of his contention appellant quotes from the case of *Clayton v. Schultz*, 4 Cal.2d 425, 50 P.2d 446. The dictum contained in the quotation taken therefrom correctly states the law but is of no assistance in determining the precise question presented on appeal to this court. Likewise we have no quarrel with the principles propounded in the other cases cited by appellant (*Archer v. Harvey*, 164 Cal. 274, 128 P. 410; *Kaiser v. Dalto*, 140 Cal. 167, 73 P. 828; *Swift v. Occidental Mining & Petroleum Co.*, 141 Cal. 161, 74 P. 700, and *Sharp v. Bowie*, 142 Cal. 462, 76 P. 62), but we do not feel that certain generalities enunciated in these decisions, passing upon facts wholly dissimilar to those herein involved, dispose of the question presented on this appeal. The four cases previously cited are the only ones to which our attention has been directed by the appellant. The respondents have failed entirely to file a reply brief.

It would appear that appellant's contentions are not sound for two reasons. First, by virtue of his specific waiver of notice of entry of judgment, he definitely precluded himself from taking advantage of the provisions contained in the Code of Civil Procedure relative to the correction of findings of fact and conclusions of law. Even had he properly moved for a new trial after notice and entry of judgment he would still have been in a position to pursue his appeal. Therefore, having so estopped himself he cannot now complain of what he contends to be erroneous findings of fact and conclusions of law. The title of the document filed by the trial court is of no particular import. In view of the waiver of findings by both parties it is nothing more than a memorandum and judgment and we are constrained to so construe it.

[2,3] Under the broad powers conferred upon the court by section 662 of the Code of Civil Procedure, the trial court was empowered, in ruling upon a motion for a new trial, if it deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law, to set aside what it termed its findings and the

judgment predicated thereon. *Clarke v. Fiedler*, 44 Cal.App.2d 838, 848, 113 P.2d 275. This was not done and all that is now presented to us for review is an appeal upon the judgment roll alone, wherein no claim is or can be made of the sufficiency of the evidence, and therefore evidence sufficient to support the ultimate conclusion of the court must be assumed. Appellant cannot on the one hand waive the code sections specifically enacted for such situations, and on the other, object to that which, if his contentions were upheld, would amount to the acceptance of particular benefits previously waived. Furthermore, had not appellant waived his right to demand findings, then any uncertainty or inconsistency therein could have been objected to or amendments proposed to such findings at the time of service. But such is not the case. He waived his right to object in the trial court, hence he cannot, on appeal, raise such questions for the first time. *Sweet v. Hamilothis*, 84 Cal.App. 775, 782, 258 P. 652.

[4] As to the second point, even if the said document is to be considered as findings of fact and conclusions of law there is still ample law to sustain the decision of the court. Assuming that the appellant's waiver was of no effect and that the document filed by the trial court should properly be considered as its findings of fact and conclusions of law, yet, nevertheless, there is ample law to sustain the decision of the court. Findings will be liberally construed so as to support the judgment, and all proper inferences will be indulged in in order to uphold the decision. This rule is well established by innumerable authorities (2 Cal.Jur. 871-873), subject, however, to the restriction that facts cannot be inferred which would contradict the facts as found by the trial court.

[5] The court did not find that plaintiffs owed defendant \$70,292.11, but rather that such sum was the total amount of the rents and issues collected by them. In support of the judgment we feel not only that we are entitled, but that it is the duty of this court, to assume that the sum found by the trial court to have been collected by the plaintiffs represents the gross receipts from the operation of the mine. And since no evidence is before us, the judgment, which was for only \$4,915.37, indicates that sufficient evidence was introduced at the trial showing that cross-defendants were

entitled to certain offsets in the nature of necessary expenditures in the operation of the mine or disbursements for taxes, assessments, maintenance or improvements of the property, which offsets properly reduced the amount to which appellant was entitled and for which he was given judgment. *Combs v. Eberhard*, 120 Cal.App. 25, 7 P.2d 338.

The instant case presents a situation similar to that found in *Wall Estate Co. v. Chamberlin Metal Weather Strip Co.*, 98 Cal.App. 345, 276 P. 1059, 1060, wherein there appeared what were termed inconsistencies in the findings and the judgment. The reviewing court in answer to a like contention stated that "presumably the court allowed as much as was reasonable under the evidence."

In the absence of a direct expression as to presumable credits we believe this conclusion is also warranted by the language in *Niles Sand & Rock Co. v. Muir*, 50 Cal. App. 637, 195 P. 699, 701, although there the opposite result was reached since there was a specific finding as to the amount of the offset. The action was one to recover on a contract of purchase of materials. The court found that the plaintiff delivered a particular amount at an agreed price but apparently through miscalculation found that a larger sum was agreed to be paid therefor, upon which certain payments had been made, and awarded the balance. On appeal the judgment was modified by reducing it by the amount representing the overcharge which was inadvertently allowed, the court saying: "It cannot be presumed, in the face of the court's finding that \$87,920.68 had been paid, that any part of that sum represented a credit of some kind the nature of which is unexplained."

In the alternative we might assume that since the judgment for damages in the present case is against the plaintiff Henri J. Quetin alone, the court found that he was the recipient of only \$4,915.37 of the \$70,292.11 collected by plaintiffs and cross-defendants.

[6] The measure of damages in an action for trespass on a mining claim, in the absence of oppression, fraud or malice, is the amount which will compensate for all the detriment proximately caused by the trespass. Accordingly, where one invades another's mine as the result of inadvertence or an honest mistake, the measure of damages therefor is the value of mineral ex-

tracted, less the cost of mining and milling. 17 Cal.Jur. 540; Dolch v. Ramsey, 57 Cal. App.2d 99, 134 P.2d 19.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.



59 Cal.App.2d 13

**NEWLAND et al. v. HATCH et al.**

Civ. 13885.

District Court of Appeal, Second District,  
Division 3, California.

May 29, 1943.

### 1. Appeal and error ☞907(3)

In action to set aside husband's deed to wife as defrauding husband's creditors, where pleadings were silent as to trust deed on realty conveyed, but trial court found that it had been conveyed to spouses jointly by deed subject to trust deed, which husband paid off, appellate court, on appeal from judgment for plaintiffs on judgment roll alone, without bill of exceptions and reporter's transcript, must presume that parties tried issue of husband's fraudulent payment of wife's half of trust deed obligation as though properly and sufficiently pleaded, and wife cannot be heard to complain that such issue was not presented by pleadings.

### 2. Appeal and error ☞1071(1)

**Trial ☞395(5)**

In action to set aside husband's deed of spouses' jointly owned realty to wife as defrauding his creditors, trial court's finding that obligations on which judgment for plaintiffs was based arose before husband's payment of entire amount of trust deed on realty was finding of "ultimate fact," but, if evidentiary, was not ground for reversal of judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Ultimate Fact".

### 3. Fraudulent conveyances ☞310

In action to set aside husband's deed of spouses' jointly owned realty to wife as defrauding husband's creditors, trial

court's finding that obligations of husband, amounting to \$8,792.05, arose before his payment of \$3,500 secured by trust deed on realty, was sufficient to authorize judgment setting aside his resulting gift of \$1,750 to wife as defrauding plaintiffs, though complaint also alleged husband's obligation in amount of \$660.21 arising after such payment.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by E. H. Newland and others against Edward E. Hatch and his wife, Ella S. Hatch, to set aside a conveyance of realty by defendant husband to defendant wife as fraudulent and void as to plaintiffs. Judgment for plaintiffs, and defendant wife appeals.

Affirmed.

Bartlett & Kearney, of Los Angeles, for appellant.

Stanley M. Arndt, Andrew O. Porter, and Charles V. Caldwell, all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

We are asked to reverse the judgment in this case not because it is claimed an injustice has been done, but because, it is argued, there has been an error in pleading and practice. The appellant, defendant, Ella S. Hatch, takes the position that the court made findings on issues foreign to the pleadings, and that the judgment, from which she appeals, makes an adjudication upon a subject matter which the pleadings nowhere mention. Appellant's criticisms are well taken, but in spite of them, we have concluded, the judgment should be affirmed, for the subject matter and issues, while not introduced by the pleadings, appear to bear no distant relation to them, and as the appeal is presented to us on the judgment roll alone we may reasonably, and must, presume that the issues were tried with the mutual consent of the parties.

[1] This action was brought by some judgment creditors of defendant Edward E. Hatch to have a conveyance of real property, made by him to the appellant, set aside as fraudulent and void as to the plaintiffs. By her answer appellant denied most of the allegations of the complaint, and added as an affirmative defense that the



real property in question had been conveyed to her and her husband as joint tenants and that she (appellant) had never disposed of her interest in any way. It will be noted that the complaint and answer are both silent as to a trust deed upon the real property with which they are concerned.

The findings, however, not only determined that the real property involved had been conveyed by grant deed to appellant and her husband as joint tenants, so that plaintiffs' judgment lien attached to only an undivided one-half interest in it, but went on to find that the grant deed was made subject to a deed of trust upon the property for \$3,500, which sum the appellant and her husband had assumed and agreed to pay. This trust deed, it is then found, was paid off by appellant's husband, his payment of her half of the obligation constituting a gift of \$1,750 to her, a gift fraudulent as to plaintiffs. The judgment contains a number of provisions calculated to circumvent these two fraudulent acts of appellant's husband.

As already indicated, appellant's attack upon the judgment, as set forth in her "Statement of Question Involved," is based upon the fact that the pleadings made no mention of the payment by appellant's husband of the obligation secured by a trust deed, yet much of the judgment is taken up with this subject and findings were made respecting it. What the answer to appellant's question would be if in this action to set aside a fraudulent conveyance there unexpectedly appeared findings on a totally unrelated matter and an adjudication respecting it, we need not determine, for it seems obvious that the trust deed was no stranger to the property involved in this action and it was introduced into the case when appellant introduced the grant deed on which she relied in her answer. There is, then, no shock occasioned if we indulge in the presumption, which in the absence of both a bill of exceptions and a reporter's transcript we must do, that the parties tried the issue as

to the fraudulent payment of the trust deed as though it were properly and sufficiently pleaded, with the result that appellant cannot be heard now to complain that it was not an issue presented by the pleadings. This solution of the problem presented by appellant is recognized in the cases relied upon by her and is required by *Freeman v. Gray-Cowan, Inc.*, 1933, 219 Cal. 85, 25 P.2d 415; *Koshaba v. Koshaba*, Cal.App., 1942, 132 P.2d 854; *Consolidated Produce Co. v. Takahashi*, 1942, 52 Cal.App.2d 753, 127 P.2d 281, and the many cases which they cite.

[2,3] The appellant makes a further contention, one not within the issues on this appeal as framed by her Statement of Question Involved. It is that the trial court erred in its finding that the obligations, upon which plaintiffs' judgment was based, arose prior to the payment of the \$3,500, excepting an obligation of \$660.21 represented by the sixth count of the complaint. Appellant first finds fault with this finding as being evidentiary. The finding appears to us to be one of ultimate fact; but if it may be characterized as evidentiary, it does not follow that the judgment should be reversed because of that. Then appellant continues: "In the second place, it is quite obvious that if the obligation for \$660.21 arose after the payment of the \$3500.00 trust deed any portion of the judgment based upon this finding is contrary to law. Certainly plaintiffs have no right to set aside a transfer made by one defendant to another where the transfer was made before any obligation to the plaintiffs arose." But by previous findings it appears that, omitting the \$660.21 count, obligations amounting to \$8,792.05 had arisen before the \$3,500 was paid, and an indebtedness of \$8,792.05 is quite sufficient to serve as the background for setting aside a gift of \$1,750.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

**KRAFT et al. v. SMITH et al.\***

Civ. 3047.

District Court of Appeal, Fourth District,  
California.

June 4, 1943.

Hearing Granted Aug. 2, 1943.

**1. Action** ⇨50(6)

Where four causes of action in complaint in malpractice action against three physicians alleged separate consequential damages following unrelated torts, attributed to separate defendants at different times and places, with no concurrence between the alleged negligent acts and with no connection between the defendants thus separately acting, there was a forbidden "misjoinder of causes of action". Code Civ.Proc. § 427.

See Words and Phrases, Permanent Edition, for all other definitions of "Misjoinder of Causes of Action".

**2. Statutes** ⇨225

Court, in passing on what is intended by statutes respecting joinder of defendants, must also consider statute providing that causes of action which may be joined must affect all parties to the action. Code Civ.Proc. §§ 379a, 379c, 427.

**3. Parties** ⇨25

Statutes respecting joinder of defendants should be construed liberally, but not to bring in wholly independent actor on mere conjecture. Code Civ.Proc. §§ 379a, 379c.

**4. Parties** ⇨25

In order that parties may be joined as defendants, such parties must be associated in the events producing the injury complained of under circumstances creating uncertainty as to which party is liable. Code Civ.Proc. §§ 379a, 379c.

**5. Parties** ⇨25

In order that parties may be joined as defendants, there must be a fair doubt as to whom plaintiff should look to for relief. Code Civ.Proc. §§ 379a, 379c.

**6. Action** ⇨50(4)

Statutes respecting joinder of defendants do not authorize a plaintiff who asserts cause of action against one party concerning which there is no uncertainty to combine with such cause of action a cause

of action against others, on allegations that the others also may be liable.

**7. Parties** ⇨25

In order to authorize joinder of defendants, it must appear, even where action is properly in the alternative, that cause of action exists in favor of plaintiff against defendants collectively considered, though plaintiff cannot identify among such defendants the author of the wrong to plaintiff.

**8. Action** ⇨50(4)

An action at law for damages may not be maintained against several defendants jointly where each defendant acted independently of the other defendants, and where there was no concert or unity of design between the defendants, since in such case tort of each defendant is "several" and does not become "joint" because consequences of each defendant's tort afterwards united with consequences of torts of other persons.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tort" and "Several Tort".

**9. Action** ⇨50(1)

Where one of several causes of action affects all parties thereto, fact that other causes of action affect only some of the parties will not cause a "misjoinder" where all the parties are concerned in the main purpose of the litigation.

See Words and Phrases, Permanent Edition, for all other definitions of "Misjoinder".

**10. Action** ⇨45(1)

Causes of complaint differing in their nature and having no connection with each other may not be united.

**11. Action** ⇨48(1)

Rule that causes of complaint differing in their nature and having no connection with each other may not be united does not apply where there is variety of circumstances so connected as to form one transaction, though the parties are not equally affected.

**12. Action** ⇨50(6)

Where last of four causes of action in complaint in malpractice action by husband and wife against three physicians made no new allegation of negligence against physicians, but adopted by reference allegations of negligence in three preceding causes of

\* Subsequent opinion 148 P.2d 23.

action, which were separately stated as against each physician, and alleged that as result of those acts of negligence husband had been forced to incur certain medical expenses, fourth cause of action did not "affect" all of defendants within rule that where one of several causes of action affects all of the parties, fact that other causes affect only some of the parties will not cause a misjoinder. Code Civ.Proc. §§ 379a, 379c, 427.

See Words and Phrases, Permanent Edition, for all other definitions of "Affect".

### 13. Action — 50(6)

Where four causes of action in complaint of malpractice against three physicians alleged separate consequential damages following unrelated torts attributed to separate defendants at different times and places, with no concurrence between alleged negligent acts and with no connection between the defendants thus separately acting, not all the defendants were "concerned in the main purpose of the litigation" within rule that where one of several causes of action affects all the parties thereto, fact that other causes affect only some of the parties will not cause a misjoinder where all parties are concerned in main purpose of litigation. Code Civ. Proc. §§ 379a, 379c, 427.

See Words and Phrases, Permanent Edition, for all other definitions of "Concerned in the Main Purpose of the Litigation".

### 14. Action — 50(6)

Where separate causes of action in complaint in malpractice action against three physicians alleged separate acts of negligence on part of each of two of the physicians, and affected the two physicians separately, there was a "misjoinder of causes of action", though treatment by both physicians was for the same injury to the plaintiff. Code Civ.Proc. §§ 379a, 379c, 427.

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Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Wanda Kraft and husband against Joseph Smith and others for malpractice. From a judgment based on an order sustaining the demurrer of the defendant E. C. Innis to the second amended complaint, plaintiffs appeal.

Judgment affirmed.

Joseph D. Taylor and John S. Bolton, both of Los Angeles, for appellants.

Fred O. Reed, Richard L. Kirtland, and Henry E. Kappler, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is a malpractice action. The defendant Innis filed a demurrer to the second amended complaint on the grounds, among others, that there was a misjoinder of parties and a misjoinder of causes of action. The plaintiffs have appealed from a judgment based upon an order sustaining his demurrer without leave to amend.

A demurrer to a first amended complaint had been previously sustained with leave to amend. The allegations of the four causes of action in the first amended complaint are summarized in *Kraft v. Innis*, 57 Cal.App.2d 637, 135 P.2d 29. The only material change in the second amended complaint is the addition of a "doubt" allegation in the third cause of action. In the second amended complaint, the first cause of action alleges that on June 15, 1940, the plaintiff wife employed the defendants to treat certain injuries sustained by her, including broken bones and broken teeth; that on that date she entered the San Joaquin Hospital in Kern County; that she was there treated by the defendant Joseph Smith; that he was negligent in the manner in which he set her bones and in failing to take X-ray pictures; and that she was thereby damaged in the sum of \$25,000. The second cause of action, which is not material here, alleges negligence on the part of the defendant Samuel Smith in treating and repairing her teeth, to her damage in the sum of \$25,000. The third cause of action alleges that on June 24, 1940, Mrs. Kraft employed this respondent to treat certain injuries sustained by her, and entered a hospital in Los Angeles County for said treatment; that said injuries were the same which had been treated by Dr. Smith and arose out of the same accident; that the plaintiffs are in doubt as to whether they are entitled to redress from Dr. Smith or from this respondent, or both; that this respondent failed to make the necessary observations and to take the necessary X-ray pictures, by reason whereof the plaintiffs are unable to determine whether or not Mrs. Kraft's present condition is the proximate result of the negligent treatment by Dr. Smith or of the negligence of this respondent; and



that this respondent negligently treated her to her damage in the sum of \$25,000. The fourth cause of action repeats, by reference, most of the allegations of the other three causes of action and alleges that by reason thereof the plaintiff husband has been forced to incur certain medical expenses.

[1] The controlling question is whether a misjoinder of causes of action here appears. These several causes of action allege separate consequential damages following unrelated torts attributed to separate defendants at different times and places, with no concurrence between the acts of negligence and no connection between the defendants thus separately acting. The uniting of such causes of action seems to be forbidden by section 427, which provides that the causes of action which may be united under its provisions "must affect all the parties to the action." (All section numbers herein refer to the Code of Civil Procedure.)

[2] The appellants argue that the joinder here in question is authorized by section 379a, which provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist and, more particularly, by section 379c, which provides that defendants may be joined where the plaintiff is in doubt as to the person from whom he is entitled to redress. These sections relate to the parties to an action but in passing upon what is intended thereby section 427, which relates to the causes of action which may be joined, must be also considered and its provisions given effect, where possible, under the usual rules of statutory construction.

[3-7] The sections thus relied on have been discussed in several cases in this state under varying sets of circumstances. In *Busset v. California Builders Co.*, 123 Cal.App. 657, 12 P.2d 36, 40, it was held that there was a misjoinder of parties. In discussing sections 379a and 379c, the court said: "The sections should be liberally construed in furtherance of administrative efficiency, but should not be so loosely applied as to bring into court upon bare conjecture a distinct personality, who is pictured not in combination or collaboration with, or as a presumptive agent of, some other party defendant, but as a wholly independent actor. A mere doubt or suspicion is not enough to bring section 379c into play. There must be some nexus associating the

defendants in an event or series of events productive of the injury complained of, under such circumstances that, while there is certainty as to the alleged wrong to be righted, there is uncertainty as to which of two or more individuals implicated is legally liable therefor. As is said in *Klein v. Betzold*, 119 Misc. 505, 197 N.Y.S. 501, and repeated in *Freund Coat Corp. v. Lipschutz*, 135 Misc. 553, 238 N.Y.S. 239, the doubt contemplated in the section must be 'a fair doubt as to whom plaintiff should look to right a single wrong, and not a doubt as to whether one or several persons have separately wronged plaintiff.'"

These principles were quoted with approval in *San Francisco M. Co., Ltd., v. Mordecai*, 134 Cal.App. 755, 26 P.2d 669, 671, where there were four distinct causes of action, each seeking relief against but one defendant, there being nothing alleged to connect any one of the causes of action with any other. In that case, it was said: "In *Garrett v. McAllister*, 137 Misc. 721, 244 N.Y.S. 283, 286, the court, in construing section 213 of the Civil Practice Act of New York, which is identical with section 379c of our Code, said: 'It (sec. 213) does not apply where the plaintiff's only doubt is whether a particular defendant is or is not liable. It does not authorize a plaintiff, who asserts a cause of action against one party concerning which no uncertainty exists, to combine with it a cause of action against others upon allegations that they also "may" be liable. \* \* \* Even where the action is properly in the alternative, it must appear that there exists a cause of action in favor of the plaintiff against the defendants collectively considered, although the plaintiff is not able to identify among them the author of the wrong.'"

In *Morris v. Duncan*, 14 Cal.App.2d 635, 58 P.2d 669, the plaintiff was injured when an automobile in which she was riding crashed through a barricade and dropped into a stream bed. The driver of the car and the County of Los Angeles were joined as defendants, it being alleged that the driver disregarded the barricade and the danger sign and also that the barricade and signs maintained by the county were insufficient. It was further alleged that the plaintiff was in doubt as to which defendant was liable or whether they both were. In discussing sections 379a and 379c the court approved the rules laid down in *Busset v. California Builders Co.*, supra,

but held that the two possible causes of the wrong, as alleged, were so linked together as to justify the joinder under these rules. The only cause of action alleged affected all parties to the action.

In *Peters v. Bigelow*, 137 Cal.App. 135, 30 P.2d 450, only one transaction or incident was involved, although two plaintiffs were affected. It was held that there was no misjoinder of parties because the 1927 amendment to section 378, permitting the joinder of plaintiffs whose claims to relief arose out of the same transaction, had the effect of excepting the matter of parties plaintiff, covered by section 378, from the requirements of section 427. The reason for permitting the joinder of the causes of separate plaintiffs which arise out of the same transaction or incident, and which involve the same defendants, is clearly apparent. To permit a joinder of defendants on causes of action arising from separate and distinct incidents occurring at different times and places, in no way connected in their origin, and involving different witnesses and evidence, is quite a different matter. In this regard it is most suggestive that the legislature has not seen fit to similarly amend section 379 to except the matter of parties defendant from the requirements of section 427.

[8] The distinction thus recognized in our statutes is clearly maintained and followed in other decisions in this state which involve circumstances more nearly similar to those with which we are here concerned. In *Ramsey v. Powers*, 74 Cal.App. 621, 241 P. 567, 568, it was held that since the evidence disclosed that two separate torts had been committed by the defendants at different times and the two defendants had not acted jointly, the two tortious acts "constituted two different, distinct and independent transactions carried out by two different persons acting independently of each other." The court then said: "\* \* \* the plaintiff not only failed to show that the defendants were joint tortfeasors, but that the evidence affirmatively shows that they acted in two entirely different transactions and independently of each other, or, in other words, that there was, in the carrying out of the two transactions, no concert of purpose between them. It follows that there is here not only a misjoinder of parties defendants, but a misjoinder of causes of action. For these reasons alone, if for no other, there was no alternative left to the trial court but to

grant the motion for a nonsuit. The authorities are quite uniform upon this proposition."

The court then quoted from *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 P. 550, 22 Am.St.Rep. 254, as follows: "It is clear that the rule as established by the general authorities is that an action at law for damages cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. It is held that in such a case the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons."

The rule thus expressed in *Miller v. Highland Ditch Co.*, is approved and reaffirmed in *Slater v. Pacific American Oil Co.*, 212 Cal. 648, 300 P. 31.

[9-13] We find nothing in *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017, 1023, which is inconsistent with these rules. In that case, both of the defendants in question were intimately connected with the same transaction and with the main purpose of the action. It was pointed out that notwithstanding the provisions of section 427, if one of several causes of action affects all of the parties the fact that other causes affect only some of the parties is not sufficient to cause a misjoinder "where all the parties are concerned in the main purpose of the litigation." The court then said: "Of course, causes of complaint differing in their nature, and having no connection with each other, cannot be united. The object of this exception is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, but the exception has no application to a case embracing a variety of circumstances, so connected as to form one transaction, even though the parties are not equally affected."

The appellants argue that in the instant case the fourth cause of action affects all of the defendants and thus comes within the rule announced in the *Joerger* case. The fourth cause of action makes no new allegation of negligence against the defendants. It adopts, by reference, the allegations of negligence contained in the three preceding causes of action, which were separately stated as against each

defendant, and then alleges that as a result of those acts of negligence the plaintiff husband has been forced to incur certain medical expenses. Under the fourth cause of action liability could only be imposed because of the negligence thus alleged and all of the defendants were not affected by any one of these acts of negligence. Moreover, all of the defendants were not concerned in the main purpose of the litigation, which was to recover damages for a present condition caused by and arising from two separate and distinct torts. Each defendant was affected by one of the causes of action but neither was affected by anything which concerned the other.

[14] In *Blodgett v. Trumbull*, 83 Cal. App. 566, 257 P. 199, 202, it is said that the courts are disposed to give a liberal construction to section 427, "to the end that closely related controversies between the same parties may be adjudicated at one time." Under the circumstances which here appear, section 427 should not be given an entirely different meaning under the guise of construction. Moreover, the two controversies which are material here are not closely related ones between the same parties, within the meaning there intended. As between this respondent and the doctor in Bakersfield no connection existed, either in their employment or in their negligence, if any. Separate acts of negligence on the part of each are alleged and separate causes of action affect them separately and do not affect both of them as required by section 427. The two torts are separate and distinct and in no way connected. The one occurred in Kern County, and involves acts done by one of the defendants at a time when Mrs. Kraft was in a certain condition, and under the standard of practice which prevails there. The other involves acts at a different time in Los Angeles County, where the standard of practice may well have been different, and when the patient was in a different condition. Not only would different evidence, in large part, be required on the part of the plaintiffs in support of the respective causes of action, but the evidence and witnesses on behalf of the respective defendants would be almost entirely different. Nor can it be fairly said that each of these defendants contributed to the same injury. The injury for which each is liable is that caused by his respective negligence. These acts of negligence, if any, were separate and distinct and each caused a

different injury, and the fact that the injured party in each case happens to be the same person is not controlling. It seems apparent that, under our statutes, a cause of action for injuries suffered in an automobile collision in one county may not be joined with a cause of action for another and further injury to the same party in a later accident in a different county. We see no difference in principle between such a case and the one now before us. Sections 379a and 379c should be considered and construed in connection with section 427. So considered and construed, we think they do not permit the joinder of the separate and distinct causes of action here in question.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 746

**TROWBRIDGE v. LOVE, et al.**

Civ. 12348.

District Court of Appeal, First District,  
Division 1, California.

May 25, 1943.

#### 1. Judgment $\S$ 243

Where action to determine rights under note and trust deed was dismissed without prejudice as against mortgagor's husband upon husband's death, any claim of obligation by husband on the note and trust deed disappeared and no judgment could be rendered against husband or his estate.

#### 2. Executors and administrators $\S$ 315(9)

Where wife took title to property but husband joined in note and trust deed to grantor, and will of subsequent holder of mortgage gave to wife "the money she owes me on note secured by deed of trust", and order of partial distribution under such will provided that obligation of the note and trust deed was "cancelled, forgiven and extinguished", husband's obligation and lien of the trust deed, as well as wife's obligation, were discharged.



**3. Executors and administrators** §315(9)

A decree of partial distribution under will should be interpreted in view of the law applicable to the subject matter, the parties and the circumstances. Civil Code, § 2909.

**4. Mortgages** §148

Where trust deed was connected with debt secured and nothing else, forgiveness of the debt carried with it the security.

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Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Delger Trowbridge, executor of the last will and testament of Rose A. Cyrus, deceased, against Elvera R. Love, administratrix of the estate of Minna R. Herrington, deceased, and others, for determination of rights under note and deed of trust and to have the deed of trust declared a lien. From an adverse judgment, plaintiff appeals.

Affirmed.

Cushing & Cushing, Cullinan, Trowbridge & Gorrill, of San Francisco, for appellant.

Crozier C. Culp and Marvin Sherwin, both of Oakland, for respondent.

WARD, Justice.

This is an action by an executor to have the rights and obligations of the respective parties to a note and deed of trust determined, and to have the latter declared a lien upon the real property of Minna R. Herrington, respondent's decedent.

The property was originally purchased by Minna Herrington from Ellen R. Billis in 1922, title thereto being taken in her own name. At the time of the purchase, she and her husband executed a note to the grantor, secured by a deed of trust on the property, which note and deed of trust were subsequently inherited by Rose A. Cyrus. Upon the death of Rose Cyrus in January of 1939, there was due on the note the amount of \$1,518 principal, plus interest. A codicil to her will made the following provision: "I give Minna R. Herrington the money she owes me on note secured by Deed of Trust on property 719 & 721 11th St., Oakland, Cal." Thereafter plaintiff duly qualified and was appointed executor of the estate of Mrs. Cyrus. On January 30, 1941, Mrs. Herrington ex-

ecuted, acknowledged and delivered to her husband a release and discharge of any obligation or liability in connection with the aforementioned note and deed of trust, and shortly thereafter she made a demand upon the sole surviving trustee under the said deed of trust for a deed of reconveyance based upon the will of Rose Cyrus, which demand was complied with, and the deed recorded. At about the same time Mrs. Herrington served upon plaintiff executor a demand for final distribution to her of the promissory note and deed of trust, with which demand he refused to comply. Thereafter, she petitioned the probate court for a partial distribution in the matter of the Cyrus estate, and, over the protest of plaintiff, an order was made the terms of which include the following: "That the court further and specifically finds that no injury can result to the estate, or to any creditor thereof, from the partial distribution to petitioner prayed for in her petition, to wit, distribution to petitioner of all of the right, title and interest in and to said promissory note and said deed of trust to which petitioner may be entitled under and by virtue of the terms and provisions of said codicil, and that the obligation of petitioner to decedent and to her estate in connection with said note and said deed of trust be cancelled and extinguished in accordance with the wishes of the deceased in accordance with the terms and provisions of said codicil; and that the petitioner is entitled at this time to receive said distribution to her thereof without giving any bond. Now, Therefore, It Is Hereby Ordered that the financial obligation of said petitioner, Minna R. Herrington, to the deceased and to her estate, in connection with and arising out of that certain promissory note dated February 15, 1922, and said deed of trust of even date therewith upon the real property at #719 and #721 11th Street, Oakland, California, be, and the same is hereby cancelled, forgiven and extinguished, and the same is hereby distributed to and vested in said petitioner, Minna R. Herrington."

In the present action plaintiff seeks to have the property determined to be subject to the deed of trust. The action was later dismissed as to all defendants except Minna Herrington, whose personal representative was substituted after her death, and the sole surviving trustee under the deed of trust. The cause was submitted to the trial court upon an agreed statement

of facts, and, following the filing of briefs by the respective parties, the court gave judgment quieting the title of defendant administratrix to said real property, and decreeing judgment for both defendants against plaintiff executor for costs of suit.

The appeal is presented on the judgment roll alone, and appellant (plaintiff) states that "The only substantial issue in the case is whether or not the lien of the deed of trust to secure payment of the admitted balance of \$1518.00 unpaid on the note with interest as aforesaid, was discharged by the codicil to the will of the owner of the deed of trust, Rose A. Cyrus. Appellant contends that while this codicil may have discharged the financial obligation of one of the makers of the note and deed of trust, it did not discharge the obligation of the other maker of the note and deed of trust, or the lien of the deed of trust"—in other words, that the obligation of Mr. Herrington has not been cancelled, nor, consequently, the security given therefor. Plaintiff is not seeking a money recovery against the estate of Mrs. Herrington.

[1] Mrs. Herrington's husband was originally a party defendant, but prior to the filing of an amended and supplemental complaint he died leaving no estate. Thereupon the action was dismissed as to him without prejudice. If there was any claim of obligation on the part of the husband based upon the note and deed of trust it disappeared in the dismissal of the action against him. In the present state of the record no judgment could be rendered against him, or his estate, if any existed. *Rogers v. Transamerica Corp.*, 6 Cal.App.2d 340, 44 P.2d 635; *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 97 P. 516; *Foster v. Warren*, 39 Cal.App.2d 470, 103 P.2d 591; *Page v. W. W. Chase Co.*, 145 Cal. 578, 79 P. 278.

In this appeal we are interested in the issues raised by the executor of the Rose A. Cyrus estate and the administratrix of the estate of Minna R. Herrington. The probate court, as above stated, interpreted the codicil as cancelling, forgiving and extinguishing the obligation of Mrs. Herrington in connection with and arising out of the note and deed of trust. No appeal was taken from the order of partial distribution and it has become final. The trial court herein appears to have given a reasonable interpretation to that order, and appellant has not demonstrated such interpretation to be erroneous as a matter of law. However,

two lines of thought on the interpretation of written instruments have been followed by the reviewing courts of this state. In *Estate of Wilson*, 40 Cal.App.2d 229, 234, 104 P.2d 716, 719 the court, following the long standing rule, said: "\* \* \* it is a well-settled legal doctrine that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intention of the parties making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable [citing cases]."

In *Johnston v. Landucci*, Cal.Sup., 130 P.2d 405, it was determined that the construction given an assignment should be consistent with the intention of the parties as demonstrated by "the evidence." In *Estate of Platt*, Cal.Sup., 131 P.2d 825, 830 the court said: "An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence \* \* \* where there is no conflict in the evidence \* \* \* or a determination has been made upon incompetent evidence [citing cases]." In *Eastman Oil etc. Corp. v. Lane-Wells Co.*, Cal.Sup., 136 P.2d 564, 566, it was held in effect that a contract should be examined "in the light of all the evidence." In that case it was held that the evidence was in conflict and therefore gave rise to varying inferences. The trial court's interpretation was upheld.

Relative to the present controversy, in the probate proceedings the court, "after hearing evidence," found that the obligation arising out of the note and deed of trust was "cancelled, forgiven and extinguished, and the same is hereby distributed to and vested in petitioner, Minna R. Herrington." In the record taken on the judgment roll on this appeal it appears that the cause was submitted on an agreed statement of facts in the trial court, and the order of partial distribution is marked as an exhibit. The findings relate a history of the financial transaction involved, the pendency of probate proceedings, etc., and recite that no additional evidence or testimony was introduced.

[2] If this question of construction is viewed in the light of the holding in *Estate of Wilson*, supra, the controversy is at an end. If it be considered as a matter in which evidence was introduced, as appears from the agreed statement of facts, we find no incompetent evidence (*Estate of Platt*, su-

pra) and no material conflict therein. Upon the basis that the trial court reached the more reasonable construction (*Johnston v. Landucci*, supra), the judgment should be affirmed.

If the interpretation of the terms of the decree, in turn depending on the wording of the codicil, be construed independently of the rule in the *Wilson* and other cases, or in the *Platt* and similar cases, or in the *Eastman Oil* corporation case, or we give our own interpretation to the instrument with all of them in mind, we are of the opinion that the trial court's holding is correct.

This is not an action to set aside an alleged unauthorized reconveyance by the trustee under the deed of trust (*Phelps v. American Mtg. Co.*, 6 Cal.2d 604, 59 P.2d 95), but rather an action for declaratory relief. In the cases cited by appellant on the main question, the legacy had lapsed, or the word "give" instead of the word "forgive" was used, or it was held that the bequest cancelled only a designated and not an additional debt, or the designation of the note and parties was not definite, etc. *Toplis v. Baker*, 2 Cox Chan. Cas. 118, 30 Eng.Reprint 55; *Heaton v. Merchant's Executors*, 35 N.J.Eq. 561; *Izon & Whitehurst v. Butler*, 2 Price 34, 146 Eng.Reprint 13; *Waterman v. Alden*, 143 U.S. 196, 12 S.Ct. 435, 36 L.Ed. 123; *Matter of Lee* (In re *Dwight's Estate*), 141 N.Y. 58, 35 N.E. 936. Certain language used in the cited opinions lends color to appellant's position that the wording of the codicil did not extinguish the lien of the deed of trust, but the more reasonable construction is to the contrary.

[3,4] The decree of partial distribution should be interpreted in view of the law applicable to the subject matter, the parties and the circumstances. Civil Code, § 2909. The deed of trust was the method

used to secure the debt. It is connected with this particular debt and nothing else. The forgiveness of the debt carries with it the security. In *Martin v. Mowlin*, 97 Eng.Rep. 658, 663, cited with approval in *Union Supply Co. v. Morris*, 220 Cal. 331, 339, 30 P.2d 394, the court said: "\* \* \* the right to the land would follow, notwithstanding the statute of frauds."

If the deed of trust should be enforced, the cancellation of the note would be of no consequence. It would mean that the decree cancelled the indebtedness but that it must be paid to the *Cyrus* estate despite that fact. The decree should be construed to give effect to the will. It is inconceivable that the testator intended the forgiveness of the indebtedness as expressed in the codicil, but that she knew her administrator would enforce the indebtedness under the terms of the deed of trust.

The language used in the decree here considered, and the fact that the same court ordered payment of an inheritance tax by *Minna Herrington* based upon the cancellation of the financial obligation demonstrate the interpretation placed upon the codicil by the probate judge.

Irrespective of the rule applicable to the interpretation of the provisions of the decree, the trial court in the present action adopted the more reasonable construction of the decedent's testament.

The obligation having been forgiven, it was at an end and no longer bound Mr. *Herrington*, the co-maker. Moreover, the circumstances indicate that he was an accommodation maker. The contention of appellant to the contrary is inconsistent with the dismissal of the action against him.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.















# CALIFORNIA REPORTER

## 138 PACIFIC REPORTER

### SECOND SERIES

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22 Cal.2d 205

#### **HUNSTOCK v. ESTATE DEVELOPMENT CORPORATION.**

**L. A. 18244.**

**Supreme Court of California.**

**May 17, 1943.**

**Rehearing Denied June 14, 1943.**

#### **1. Corporations ⚡507(4)**

Under statute authorizing service of summons on corporation by delivery of copy thereof to specified persons, the words "by delivering" require personal service upon the designated persons. Code Civ. Proc. § 411; Civ.Code, § 373.

See Words and Phrases, Permanent Edition, for all other definitions of "By Delivery".

#### **2. Corporations ⚡507(4)**

Under statute providing for service upon corporation by "delivery" of copy to designated agents, delivery should be made by hand. Code Civ. Proc. § 411; Civ.Code, § 373.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

#### **3. Statutes ⚡209**

A word which is used more than once in a statute is to be given the same meaning in each instance unless a contrary intention clearly appears.

#### **4. Corporations ⚡507(12)**

The section of the Civil Code, authorizing service on corporation by delivering copy to the secretary of state under certain circumstances uses the word "delivery" as excluding any means other than manual, and does not authorize mailing copy to secretary of state. Code Civ. Proc. § 411; Civ.Code, § 373.

138 P.2d—1

#### **5. Statutes ⚡231**

The codal sections governing service of summons on corporation are in "pari materia" and must be construed together, and word delivery must be given the same meaning in each. Code Civ. Proc. § 411; Civ.Code, § 373.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Materia".

#### **6. Notice ⚡10**

"Delivery" constituting personal service of notices and papers may be effected by mailing. Code Civ. Proc. § 1011.

#### **7. Process ⚡49, 64**

Service of summons and complaint in an action is not governed by section 1011 of the Code of Civil Procedure applicable to service of notice and papers, but by section 411, carrying into effect the common law rule of personal delivery. Code Civ. Proc. §§ 411, 1011, 1012; Civ.Code, § 373.

#### **8. Corporations ⚡507(14)**

Where plaintiff attempted to serve corporation by mailing copy of summons and process to secretary of state, letter from secretary of state reciting that the copy had been transmitted by registered letter to the corporation did not "waive" the statutory requirement of personal delivery upon secretary of state. Code Civ. Proc. § 411; Civ.Code, § 373.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

#### **9. Judgment ⚡17(9)**

A default judgment against corporation, based on invalid service of process by merely mailing to secretary of state, would not be held valid on ground that secretary of state actually received a copy



of the process. Code Civ.Proc. §§ 411, 1011, 1012; Civ.Code, § 373.

#### 10. Constitutional law ⇨70(1)

In determining validity of service of process by mailing, argument based upon needless expense of requiring manual delivery should be addressed to Legislature and not courts.

CARTER, J., and PETERS, Justice, *per tem.* dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge *pro tem.*

Action by Maud H. Hunstock, individually and as trustee, against the Estate Development Corporation, to foreclose a mortgage. From an adverse judgment, defendant appeals.

Reversed.

For prior opinion, see 126 P.2d 932.

Dryer, Richards & Page, of Los Angeles, for appellant.

Crail, Crail & Crail, of Los Angeles, for respondents.

EDMONDS, Justice.

A decree of foreclosure which orders the sale of real property to satisfy a note secured by a mortgage, and also gives the mortgagee a judgment for any deficiency, is challenged solely upon jurisdictional grounds. The determinative question for decision is whether service of process may be made upon a domestic corporation, within the authorization of section 373 of the Civil Code, by mailing a copy of the summons and complaint to the Secretary of State.

The appellant, Estate Development Corporation, a domestic corporation, is the maker of the note and mortgage sued upon. The instruments were executed on behalf of the corporation by H. Ellis Martin, president, and L. J. Martin, secretary. Harry E. Martin, as an individual, also signed them.

Nine months after the complaint for foreclosure was filed and the summons issued thereon, John H. Nutt, one of the attorneys for the respondent mortgagee,

made an *ex parte* application for an order directing that service in the action be made upon the mortgagor by delivering to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, a copy of the summons and complaint in the action. As the basis for such an order, Nutt stated in an affidavit that although due diligence had been exercised, personal service of process could not be made upon the appellant in any other manner. In further support of the application, Nutt presented an affidavit made by the respondent, and another by S. N. West, stating in detail the efforts which had been made by them to secure personal service of process upon the appellant's officers.

The superior court granted the application and directed that service of the summons and complaint in the action be made "by delivering to the Secretary of State of the State of California, or to any person employed in his office in the capacity of assistant or deputy, one copy of said summons and complaint, pursuant to the provisions of Section 373 of the Civil Code of the State of California." An affidavit of service was later filed in which Nutt averred that on July 20, 1938, he had "caused to be mailed, by registered mail, a copy of the summons and complaint, in the action \* \* \* to Frank C. Jordan, Secretary of State of the State of California, Sacramento, California, in pursuance of said order of this court." Thereafter, his affidavit continued, he "received a letter from Frank C. Jordan, Secretary of State of the State of California, signed by Robert Jordan, Assistant Secretary of State \* \* \* [which] sets forth the fact that process above mentioned was duly received by said Secretary of State and was duly forwarded by him to Estate Development Corporation, care of H. E. Martin, 812 South Detroit Street, Los Angeles, California."

On November 29, 1938, the corporation's default was entered. Two and one-half years later, it moved to quash service of the summons and complaint. This motion was denied. Four months later, the court rendered the default judgment from which the mortgagor is prosecuting the present appeal.

The appellant proceeds upon the theory that the judgment against it is void for the reason that no service of process was

ever made upon it; therefore, since it did not voluntarily appear in the action, the court was without jurisdiction to enter its default or to render judgment against it. The attack is based upon the manner of the purported service, the sufficiency of the affidavits to justify the order permitting substituted service, and the sufficiency of the affidavit of proof of service. However, the determinative question is whether the statutory requirements are satisfied by mailing to the Secretary of State a copy of the summons and complaint.

[1] At the date of the order directing substituted service upon the appellant, the summons in a civil action was required to be served "by delivering a copy thereof as follows: 1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. \* \* \* If no such officer or agent of the corporation can be found within the state after diligent search, then to the secretary of state as provided in section 373 of the Civil Code." Code Civ.Proc. sec. 411. It may be stated as a certainty that the words "by delivering" as used in this statute require personal service upon the designated persons. See *Holiness Church v. Metropolitan Church Ass'n*, 12 Cal.App. 445, 107 P. 633.

The complementary Civil Code section then read: "Every domestic corporation may file with the Secretary of State a designation of a natural person, stating his residence or business address in this State, as its agent for the purpose of service of process, and the delivery to such agent of a copy of any process against such corporation shall constitute valid service on such corporation. \* \* \* If such designation has not been filed with the Secretary of State, and if personal service of process against such domestic corporation cannot be made with the exercise of due diligence in any other manner provided by law and the fact appears by affidavit to the satisfaction of the court or a judge thereof, such court or judge may make an order that the service be made upon such corporation by delivering to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, one copy of such process for each defendant to be served. Service in such manner

shall be and constitute personal service upon such corporation. Upon the receipt of such copy of process, the Secretary of State shall give notice of the service of such process to the corporation at its principal office in this State, by forwarding to such office, by registered mail with request for return receipt, such copy of such process. The defendant shall appear and answer within thirty days after delivery of such process to the Secretary of State." Civ.Code, sec. 373.

There is then this situation: Section 411 of the Code of Civil Procedure, which is the general statute providing for the manner of service upon a domestic corporation, requires personal delivery of process to a designated person. That section is supplemented by section 373 of the Civil Code, which is specifically referred to as stating the method to be used to effect service when an officer or agent of the corporation cannot be found within the state. In the Civil Code enactment, the Legislature has twice used the word "delivery." First, it has provided that service may be made by "the delivery to \* \* \* [its designated] agent of a copy of any process." Next it has authorized, under certain circumstances, service "by delivering [a copy of the process] to the Secretary of State."

[2-4] It will not be seriously argued that by the use of the word "delivery" in the sentence referring to service upon an agent, the Legislature intended that it should be made in any other manner than by hand. And in addition to the rule that a word which is used more than once in a statute is to be given the same meaning in each instance, unless a contrary intention clearly appears (*Coleman v. City of Oakland*, 110 Cal.App. 715, 295 P. 59), the context of section 373 requires a definition of "delivery" as excluding any means other than manual. For the service upon the Secretary of State may be made by delivery of the process not only to him but also "to any person employed in his office in the capacity of assistant or deputy." The obvious purpose of this provision is to make a number of persons available for the service of process, a purpose which would be entirely unnecessary if the legislature had intended delivery of a copy of the process to be made by mail or express addressed to the Secretary of State and re-

ceived in the course of the routine business of the office.

The contentions of the respondent would lead to this curious result: Although the word "delivery" must be construed as meaning delivery by hand when used in section 411 of the Code of Civil Procedure and one provision of section 373 of the Civil Code, whose terms are incorporated into the general statute by reference, it should be so broadly defined in the next sentence of the same section as allowing a delivery by mail. There is no reasonable basis in law or logic for such a construction.

[5] Another elementary rule also compels this conclusion. The two code sections both provide for the manner of service of summons upon a domestic corporation and they are closely bound together by the reference in one to the other. Unquestionably they are in *pari materia* and as such must be construed together. Accordingly, there being no contrary intention expressed by the legislature, the word "delivery" must be given the same meaning in each enactment. *Jameson Petroleum Co. v. State*, 11 Cal.App.2d 677, 680, 54 P.2d 776; *Old Homestead Bakery, Inc., v. Marsh*, 75 Cal.App. 247, 258, 259, 242 P. 749; *People v. Wells*, 11 Cal. 329; and see *City of Long Beach v. Payne*, 3 Cal.2d 184, 191, 44 P.2d 305; *Dalton v. Leland*, 22 Cal.App. 481, 486, 135 P. 54.

In support of her assertion that mailing is one method of delivery recognized by section 373, the respondent calls attention to the fact that the statute specifically authorizes mailing of the process by the Secretary of State to the principal office of the corporation. The answer to this contention is that service is complete when the process is delivered to the Secretary of State, and its subsequent mailing to the corporation is an act which follows service. As a matter of fact, the use in the section of the word "delivery" in connection with service, and of the word "mailing" with reference to a later act strongly indicates a Legislative differentiation between the formality of delivery in making service of process and the method of giving notice by mailing, after service has been made upon the Secretary of State.

[6,7] That "delivery" constituting personal service within the meaning of section 1011 of the Code of Civil Procedure

may be effected by mailing the notice or paper to be served under that section is well settled. *Code Civ.Proc. sec. 1012; Heinlen v. Heilbron*, 94 Cal. 636, 640, 30 P. 8 (notice of appeal); *Shearman v. Jorgensen*, 106 Cal. 483, 485, 39 P. 863 (notice of ruling on demurrer); and see *Colyear v. Tobriner*, 7 Cal.2d 735, 743, 62 P.2d 741, 109 A.L.R. 191 (notice of termination of tenancy). But the service of the summons and complaint in an action is not governed by that section but by section 411 of the same code, which carries into effect the common law rule of personal delivery.

The respondent also argues that a course of administrative procedure which depends upon the construction of a statute by executive officers of the state charged with the duty of executing it is entitled to consideration and is given great weight by the courts. *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712, 112 P.2d 10; *Bodinson Mfg. Co. v. California Emp. Comm.*, 17 Cal.2d 321, 325, 326, 109 P.2d 935. But she presented no evidence of an interpretation of the law by the Secretary of State which is in her favor. On the contrary, according to the appellant, the Secretary of State has consistently followed the procedure which it contends is required by the applicable code provisions.

In support of its contention, the corporation, in its brief, quotes a statement of former Secretary of State Paul Peek, addressed to the legal profession and published in legal newspapers, reading as follows: "It is true that this office is endeavoring to cooperate with the attorneys in effecting service under said section 373, and where process is received by mail with an express request that it be turned over to someone in the office for personal delivery to the Secretary of State, his assistant or a deputy, we are complying with such requests and furnishing affidavits of personal service by the individuals who actually make the service, but this procedure is available only as to process currently received. As to process previously received by mail, and not known to have been delivered to the Secretary of State, his assistant or a deputy by any given person, it is probable such defective service may be cured only by new service on one of the said authorized State officers personally."



[8] Although the respondent concedes that the Secretary of State may not waive any defect in service, she relies upon a letter written by him to her counsel as a written admission of service. In the leading case of *Bennett v. Supreme Tent, K. of M.*, 40 Wash. 431, 82 P. 744, 745, 2 L.R.A., N.S., 389, the court held that since service of summons and complaint in an action against a foreign corporation could not be made by mailing them to the insurance commissioner, the statutory agent for service of process, he could not give validity to the service by admitting or waiving service upon him. "To hold that such agent can admit or waive service of summons, where no service has been in fact made, is to add materially to the powers conferred upon him by the statute." This decision is generally regarded as being well-grounded in principle. See note, 2 L.R.A., N.S., 389; 21 R.C.L., Process, sec. 112, pp. 1360, 1361; and see *Lower v. Wilson*, 9 S.D. 252, 68 N.W. 545, 62 Am.St. Rep. 865; 42 Am.Jur., Process, sec. 33, n. 10, p. 31; 50 C.J., Process, sec. 87, p. 487. The letter of the Secretary of State in the present case, however, does not even purport to be an admission of service; it merely states that "pursuant to Section 373, Civil Code of the State of California, we have, today, transmitted, by registered letter" a copy of the summons and complaint to the corporation. When or how the process was received is not stated; indeed, the fact of receipt itself is left to implication from the statement that the copies had been mailed to the appellant.

[9] But the respondent insists that because the Secretary of State received a copy of the process, the court should not concern itself with the means by which he obtained it. That argument ignores the necessity of personal service of summons in any case where it is required. Surely no one would contend that if a natural person received a copy of process in an action against him by any means other than personal delivery, in the absence of an admission in writing of service in accordance with section 415 of the Civil Code, the court would have jurisdiction to enter a default judgment against him.

[10] The burden of service by personal delivery to the Secretary of State, or one of his deputies, is no greater than that imposed upon a plaintiff seeking to serve

a defendant personally. Indeed it is much less, for, under ordinary circumstances, one of the persons named in the statute will always be found at the State Capitol during ordinary business hours. And any argument based upon the allegedly needless expense of requiring manual delivery rather than mailing is one to be addressed to the legislature and not to the courts.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. The question presented by this appeal is whether the delivery of a summons by mail to and receipt of it by the Secretary of State followed by the mailing of it by the latter to the defendant corporation, in an action against the corporation, is sufficient compliance with the law on the subject. The case presented is properly one for substituted service and comes within the terms of section 373 of the Civil Code, as it read prior to 1941, as follows:

"Every domestic corporation may file with the Secretary of State a designation of a natural person, stating his residence or business address in this State, as its agent for the purpose of service of process, and the delivery to such agent of a copy of any process against such corporation shall constitute valid service on such corporation. Such corporation shall file with the Secretary of State notice of any change in the address of the person thus designated, and may revoke any such designation by filing notice of the revocation thereof with the Secretary of State.

"If such designation has not been filed with the Secretary of State, and if personal service of process against such domestic corporation cannot be made with the exercise of due diligence in any other manner provided by law and the fact appears by affidavit to the satisfaction of the court or a judge thereof, such court or judge may make an order that the service be made upon such corporation by *delivering to the Secretary of State*, or to any person employed in his office in the capacity of assistant or deputy, one copy of such process for each defendant to be served. Service in such manner shall be and constitute personal service upon such corporation.

Upon the receipt of such copy of process, the Secretary of State shall give notice of the service of such process to the corporation at its principal office in this State, by forwarding to such office, by registered mail with request for return receipt, such copy of such process. The defendant shall appear and answer within thirty days after delivery of such process to the Secretary of State." (Emphasis added.)

The majority opinion holds that the delivery of the summons to the Secretary of State must be a personal one and not by mail. Indulgence in such technicality should not be permitted to thwart the ends of substantial justice. It must be remembered that the service involved is *substituted* service and not personal service. It is made effective as a means of acquiring jurisdiction in personam by statutory declaration. Such service does not necessarily give the defendant personal notification of the action. It need merely be designed to be likely to have that effect. Jurisdiction is acquired if compliance is had with the statutory requirements, even though the defendant never in fact receives a copy of the summons. Requiring the defendant to be subjected to jurisdiction over its person in that manner is a reasonable regulation when it fails to designate an agent upon whom process may be served or give the names and addresses of its officers. The purpose of requiring personal delivery of a summons to a natural person is to leave no doubt that he receives notice of the action. In substituted service only a reasonable probability of that result is required. Hence, delivery by mail to the Secretary of State is sufficient. To require personal delivery to the Secretary of State is contrary to the very nature of substituted service which rather than being personal service is a substitute therefor. It follows that when the Legislature established a method of substituted service it did not

intend to require personal delivery of the summons to the Secretary of State. That personal service was not contemplated clearly appears from the case of *Holiness Church v. Metropolitan Church Ass'n*, 12 Cal.App. 445, 107 P. 633, which holds that service on a foreign corporation by delivery to the Secretary of State is not personal service; it is substituted service. If it is not personal service then no personal delivery is required. A delivery by mail accomplishes all that is required, that is, substituted service.

If the Legislature had intended to require service by personal manual delivery rather than delivery by mail, it would have so provided. It should be noted that in specifying how summons shall be served generally it is stated that: "The summons must be served by delivering a copy thereof as follows: \* \* \* 7. In all other cases to the defendant *personally*." Code of Civ.Proc., sec. 411. No requirement of *personal* delivery to the Secretary of State is made in section 373 of the Civil Code, the statute here in question. Likewise in section 413 of the Code of Civil Procedure providing that personal service out of the state may be made in lieu of mailing. The service specified is personal service. Also to the same effect are sections 1019 and 1011 of the Code of Civil Procedure.

In my opinion, the service of summons in this case was in substantial compliance with the statutory provisions relating to substituted service of summons on a domestic corporation which has not designated a person on whom service of process can be made, and the judgment should therefore be affirmed.

PETERS, Justice, pro tem., concurred.

Rehearing denied; CARTER, J., dissenting.

22 Cal.2d 203

**SALTER v. ULRICH.**

**L. A. 18359.**

Supreme Court of California.  
May 27, 1943.

**1. Judgment** ⇨485

**Stipulations** ⇨14(12)

Generally, a domestic judgment is not subject to collateral attack unless it is void on its face, but the rule may be waived by parties' stipulating to facts showing a lack of jurisdiction.

**2. Mortgages** ⇨218

A mortgagee by his own act alone cannot "waive" provisions of statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage, and sue upon the debt. Code Civ. Proc. § 726.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

**3. Mortgages** ⇨218

The benefit of statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage cannot be "waived" in advance by mortgagor. Code Civ.Proc. § 726.

**4. Mortgages** ⇨218

That a note is secured, so that an independent action thereon cannot be maintained because of statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage, is an "affirmative defense" which must be pleaded in action on the note. Code Civ. Proc. § 726.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Defense".

**5. Mortgages** ⇨218

Even if defendant, in action on note, set up defense that note was secured, so that independent action thereon could not be maintained because of statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage, trial court has jurisdiction to determine whether note was in fact secured, and plaintiff may be able to show that he has a right to recover despite fact that security was given. Code Civ.Proc. § 726.

**6. Mortgages** ⇨218

The statute prescribing foreclosure as the one form of remedy for recovery of

a debt secured by mortgage is not necessarily a bar to an action on note secured by trust deed, and benefits of statute may be "waived" by debtor's failure to call court's attention to the true situation. Code Civ.Proc. § 726.

**7. Judgment** ⇨505

Where default judgment was entered in action on note and court's attention was not directed to fact that note was secured by deed of trust, judgment was not void under statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage, and could not be collaterally attacked. Code Civ.Proc. § 726.

**8. Mortgages** ⇨390

The statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage was enacted for benefit of primary debtor. Code Civ. Proc. § 726.

**9. Judgment** ⇨507

One who was not the primary debtor would not make a "collateral attack" on a judgment entered in an action on a note on ground that note was secured and that therefore action was unauthorized under statute prescribing foreclosure as the one form of remedy for recovery of a debt secured by mortgage. Code Civ.Proc. § 726.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

**10. Appeal and error** ⇨879

Errors affecting a party who does not appeal will not be reviewed, even though excepted to by such party in trial court and included in the bill of exceptions.

**11. Execution** ⇨268

Where defendant claimed title to realty under a marshal's deed based on an execution, and plaintiff claimed title under a commissioner's deed based on foreclosure of the lien of a street improvement bond, and execution on which marshal's deed was based had been levied before commencement of foreclosure proceeding, marshal's deed was valid, notwithstanding that the debt on which the execution was based was secured by a trust deed and no steps had been taken to foreclose such trust deed according to statute. Code Civ.Proc. § 726.



**12. Execution** ☞268  
**Mortgages** ☞148

A holder of a secured note, by suing on note and securing marshal's deed at execution sale instead of foreclosing trust deed, made an "election of remedies", and holder's title secured at execution sale was subject to lien of street improvement bond, which was inferior to mortgage, but which had attached prior to execution sale. Code Civ.Proc. § 726.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies".

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**In Bank.**

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action to quiet title by Fred R. Salter against E. W. Ulrich, wherein the defendant in his answer asked that he be adjudged owner of the property. From a judgment for defendant, the plaintiff appeals.

Affirmed.

For prior opinion, see 130 P.2d 715.

Harold L. Green, of Los Angeles, for appellant.

John A. Jorgenson, of Los Angeles, for respondent.

**GIBSON, Chief Justice.**

This is an action to quiet title, and defendant in his answer asked that he be adjudged the owner of the property. Both parties claim from a common source, one C. A. Kassell, who in 1929 encumbered the property with a trust deed in favor of defendant to secure a promissory note. In 1931 a street improvement bond was issued to one Oswald against the property. In 1934 defendant brought suit on his promissory note without making reference in the complaint to the fact that the note was secured. Judgment was entered against Kassell and a writ of execution issued. The property was sold to defendant in 1936 in partial satisfaction of the judgment. The marshal's certificate of sale was recorded July 10, 1936, and his deed July 13, 1937. In December, 1936, between the date of the execution sale and the delivery of the deed, Oswald brought an action against Kassell to foreclose the lien of the bond. Defendant was not named or served in that action. Kassell defaulted, foreclosure was ordered, and the prop-

erty was sold to Oswald on June 1, 1937. Oswald sold his certificate to plaintiff and the commissioner's deed was issued to him in 1938.

Thereafter, plaintiff brought this action to quiet his title. The parties stipulated that the note sued on by defendant in the municipal court was secured by a trust deed. The trial court found that defendant became the owner of the property by reason of the execution proceedings, subject to the lien of plaintiff's street improvement bond, and judgment was rendered accordingly. Plaintiff has appealed contending that the judgment on which defendant relies is invalid because of a failure to conform to the requirements of section 726 of the Code of Civil Procedure, which prescribes foreclosure as the one form of remedy for the recovery of a debt secured by mortgage.

[1] It is the general rule that a domestic judgment is not subject to collateral attack unless it is void on its face. *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 43 A.L.R. 1509; *Burrows v. Burrows*, 10 Cal.App.2d 749, 52 P.2d 606; *Texas Co. v. Bank of America*, 5 Cal.2d 35, 53 P.2d 127; *In re Estate of Keet*, 15 Cal.2d 328, 100 P.2d 1045; *Kaufmann v. California Min. & Dredging Syndicate*, 16 Cal.2d 90, 104 P.2d 1038. It has been held, however, that the rule may be waived by the parties admitting or stipulating to the facts showing a lack of jurisdiction. *Follette v. Pacific L. & P. Corp.*, 189 Cal. 193, 208 P. 295, 23 A.L.R. 965; *In re Estate of Ivory*, 37 Cal.App.2d 22, 98 P.2d 761; *Hill v. City Cab, etc., Co.*, 79 Cal. 188, 21 P. 728. We find it unnecessary to decide whether the stipulation herein is sufficient to have this effect, since we are of the opinion that the judgment of the municipal court was not void.

[2, 3] It has been held that a mortgagee by his own act alone cannot waive the provisions of section 726 and sue upon the debt (*Bank of Italy v. Bentley*, 217 Cal. 644, 20 P.2d 940; *Western Fuel Co. v. Sanford G. Lewald Co.*, 190 Cal. 25, 210 P. 419; *Unger v. Goldman*, 12 Cal.App.2d 129, 54 P.2d 1126; note 27 Cal.L.Rev. 752), and that the benefits of the section cannot be waived in advance by the mortgagor (*Winklemen v. Sides*, 31 Cal.App.2d 387, 88 P.2d 147); but there seems to be no clear-cut decision as to the right of the mortgagor or trustor to make a subsequent

waiver, although several cases indicate that this may be done. In *Martin v. Becker*, 169 Cal. 301, 146 P. 665, Ann.Cas. 1916D, 171, after outlining the history of the changes made in the common law rule, the court said that section 726 was a natural corollary to those changes, and was intended to simplify procedure and to relieve the mortgagor, who was usually the primary debtor, from harassment in repeated litigation. It was also said that this protection, being clearly designed for the benefit of the primary debtor, is one which he can waive. Similar expressions are to be found in *Murphy v. Hellman Commercial, etc., Bank*, 43 Cal.App. 579, 185 P. 485, and *Bank of Italy v. Bentley*, 217 Cal. 644, 20 P.2d 940.

Since necessity often drives debtors to make ruinous concessions when a loan is needed, section 726 should be applied to protect them and to prevent a waiver in advance. This reasoning, however, does not apply after the loan is made, when all rights have been established and there remains only the enforcement of those rights. The situation is analogous to the right of redemption which may not be waived in advance. Civ.Code, § 2889; *Bradbury v. Davenport*, 114 Cal. 593, 46 P. 1062, 55 Am.St.Rep. 92; *Goodenow v. Ewver*, 16 Cal. 461, 76 Am.Dec. 540. However, the mortgagor may subsequently deed the property to the mortgagee or may release or sell the right of redemption. *Archer v. Salinas City*, 93 Cal. 43, 28 P. 839, 16 L.R.A. 145; *Watson v. Edwards*, 105 Cal. 70, 38 P. 527; *Clarke v. Fast*, 128 Cal. 422, 61 P. 72; *Graves v. Arizona Central Bank*, 205 Cal. 715, 272 P. 1063; *Bradbury v. Davenport*, supra.

The rule against waivers in advance has been codified by section 2953 of the Civil Code, which was adopted in 1937. This section declares to be void and unenforceable "Any agreement exacted from a borrower as a condition to the making or renewing of any loan secured by a deed of trust, mortgage or other lien \* \* \* whereby the borrower agrees to waive any rights or privileges existing under" certain code sections, including section 726 of the Code of Civil Procedure. Although section 2953 was not in effect at the time of the transactions in question, it is entirely consistent with the right of a mortgagor or trustor to make a subsequent waiver, since by its terms it purports to apply only to a waiver agreement, which is

exacted in advance as a condition to the making or renewing of any loan secured by a mortgage or deed of trust.

[4,5] The fact that a note is secured is an affirmative defense which must be pleaded. *Tucker v. Howe*, 139 Cal.App. 161, 33 P.2d 1055; *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 135 P. 502; *Hibernia S. & L. Soc. v. Thornton*, 117 Cal. 481, 49 P. 573. Even if the defendant sets up the defense that the note was secured, the trial court has jurisdiction to determine that fact (*Kempton v. Appellate Division of Superior Court*, 3 Cal.App.2d 374, 39 P.2d 846) and the plaintiff may be able to show that he has a right to recover despite the fact that security was given. *Crescent Lumber Co. v. Larson*, supra.

[6-9] It follows that section 726 of the Code of Civil Procedure is not necessarily a bar to an action on the note, and that its benefits may be waived by a failure to call the attention of the court to the true situation. Since this is a default judgment, and the attention of the court was not directed to the fact of security, the judgment is not void and cannot be collaterally attacked. In addition, section 726 was enacted for the benefit of the primary debtor. Plaintiff is not the primary debtor, but in fact claims in opposition to him, and should not be permitted to make such an attack.

[10] Defendant urges that plaintiff was not entitled to a judgment subjecting the land to the lien of plaintiff's bond, but the defendant has not appealed. It is well settled that on appeal errors affecting a party who does not appeal will not be reviewed, even though excepted to by him in the trial court and included in the bill of exceptions. *California Canning Peach Growers v. Williams*, 11 Cal.2d 233, 238, 78 P.2d 1161; *Denman v. Smith*, 14 Cal.2d 752, 755, 97 P.2d 451; *Ray v. Parker*, 15 Cal. 2d 275, 282, 101 P.2d 665.

[11] We conclude, therefore, that plaintiff cannot attack the title defendant acquired at the execution sale, as the judgment on which it was based was not void, and that defendant cannot complain of the provisions of the judgment giving plaintiff a lien on the property because he took no appeal.

[12] This is an action in equity and the decision carries out the principles of equity by giving justice to both parties. De-

fendant, by suing on the note instead of foreclosing, chose to disregard the security given and to rely on the title secured on the execution sale. Defendant thus made an election of remedies (*Ould v. Stoddard*, 54 Cal. 613; *Campan v. Molle*, 124 Cal. 415, 57 P. 208), and cannot now pursue the concurrent remedies of foreclosure by action or by trustee's sale. Having failed to try to cut off the rights of intervening creditors by foreclosing his deed of trust, defendant cannot claim a greater title than his judgment debtor had at the time of the judgment and execution sale, and since the property was then subject to the lien of plaintiff's street improvement bond, the judgment herein properly quieted title in defendant subject to that lien.

The judgment is affirmed.

**SHENK, CURTIS, EDMONDS, CARRIER, TRAYNOR, and SCHAUER, JJ., concurred.**



22 Cal.2d 259

**Ex parte MARTINEZ.**

**Cr. 4482.**

**Supreme Court of California.**

**May 24, 1943.**

### **1. Automobiles ☞62**

Though the constitutional provision giving Railroad Commission power to regulate rates of public utilities defines a "public utility" as including every common carrier and under statute "common carrier" embraces taxicabs, the Railroad Commission is not thereby given power to regulate rates of taxicabs to the exclusion of a municipality where no statute authorizes the fixing of rates for taxicabs by the Commission, since the constitution provides that a utility shall be subject to such regulation by the Commission as may be provided by the Legislature. Civ.Code, § 2168; Gen. Laws 1937, Act 6386, §§ 1, 2(dd, l), 2¼(b), 2¾, 50¾; Const. art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Carrier" and "Public Utility".

### **2. Automobiles ☞62**

Where the power to regulate taxicabs and fix rates thereof has not been conferred on Railroad Commission by statute, a municipality has the power, under its police power to pass ordinance regulating taxicabs and fixing rates thereof. Civ.Code, § 2168; Gen.Laws 1937, Act 6386, §§ 1, 2(dd, l); Const. art. 11, § 11, art. 12, § 23.

### **3. Automobiles ☞59**

Taxicab operation involves public interest and is subject to municipal regulation. Const. art. 11, § 11.

**In Bank.**

Habeas corpus proceeding by Fred Martinez seeking petitioner's discharge from custody under sentence for conviction of violating municipal ordinance regulating and fixing the rates of taxicabs.

Writ discharged and petitioner remanded to custody.

See, also, 132 P.2d 901.

**R. H. Schwab, of Sacramento, for petitioner.**

**Hugh B. Bradford, City Attorney, of Sacramento, for respondent.**

**Ira H. Rowell and Roderick B. Cassidy, both of San Francisco, amici curiae for respondent.**

**GIBSON, Chief Justice.**

Petitioner was convicted in the police court of the City of Sacramento of violating a municipal ordinance regulating and fixing the rates of taxicabs. On appeal, the judgment of conviction was affirmed by the superior court. Petitioner now seeks his discharge on habeas corpus contending that the ordinance is unconstitutional upon the ground exclusive power to fix such rates is vested in the Railroad Commission. Petitioner does not claim that the ordinance is unreasonable or discriminatory but contends that the city is without power to enact any ordinance fixing taxicab rates.

[1] Petitioner relies on section 23 of article XII of the Constitution, which reads in part as follows:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban [interurban] railroad, street railroad, canal, pipe line, plant, or equipment, or any part



of such railroad, canal, pipe line, plant or equipment within this State, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. \* \* \*

He argues that inasmuch as this constitutional provision defines a public utility as including every common carrier, which under section 2168 of the Civil Code embraces taxicabs as carriers of persons, the rates of taxicabs are therefore subject to regulation by the Railroad Commission alone. This contention entirely disregards that portion of the quoted constitutional provision which declares that the public utilities therein defined (including common carriers) shall be "subject to such control and regulation by the Railroad Commission *as may be provided by the Legislature.*" The section further provides that "The Railroad Commission *shall have and exercise such power and jurisdiction to supervise and regulate public utilities \* \* \* and to fix the rates to be charged for \* \* \* services rendered by public utilities as shall be conferred upon it by the Legislature \* \* \*.*" (Italics ours.)

The italicized language is clear in its declaration that only such of the utilities therein designated, including common carriers operating within a municipality, may be regulated by the Railroad Commission

as are made subject to such regulation by legislative enactment. In other words, while a taxicab is a common carrier (code § supra; *Bezera v. Associated Oil Co.*, 117 Cal.App. 139, 143, 3 P.2d 622; 45 A.L.R. 300) and section 23 of article XII of the Constitution declares every common carrier to be a public utility, the constitutional section further expressly declares that the public utilities therein designated shall be subject to such control and regulation by the Railroad Commission "as may be provided by the Legislature." To determine whether taxicabs and the rates thereof are subject to the jurisdiction of the Railroad Commission we must therefore look to the statutes enacted by the Legislature.

Contrary to petitioner's contention we find nothing in the Public Utilities Act (2 Deering's Gen.Laws of 1937, Act 6386, p. 3119) indicating a legislative intention that taxicabs are subject to regulation by the Railroad Commission. Section 1 of the act provides that it "shall apply to the public utilities and public services *herein described.*" Subdivision (dd) of section 2, provides that "The term 'public utility', *when used in this act*, includes every common carrier [and a long list of other utility corporations] where the service is performed for \* \* \* the public \* \* \*." Subdivision l of section 2 provides that "The term 'common carrier', *when used in this act*, includes every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing-room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading and every other car corporation or person \* \* \*." (Italics ours.)

Nowhere in the quoted provisions of the Public Utilities Act, nor in its other provisions, do we find any reference to taxicabs or taxicab companies. Each of the many agencies designated in subdivisions (dd) and (l) is specifically mentioned and described in detail or is included in groups carefully described in the act. If the Legislature had intended to include taxicabs it would not have omitted reference to them while including detailed descriptions of all other agencies covered by the act, some of which perform similar services. Moreover, references in other parts of the act to common carriers "subject to the provisions of this act" indicate a legislative intention not to include all common carriers.

In an *amicus curiae* brief filed in this proceeding at the request of the court, the Railroad Commission is in accord with our conclusion that under section 23 of article XII of the Constitution it has only such power to regulate public utilities and to fix rates as shall be conferred upon it by the Legislature. The commission states it has never attempted to regulate taxicabs and has consistently taken the position that its statutory jurisdiction extends only to fixed termini or regular route operation. The position taken by the commission in the past is supported by sections 2¼ (b), 2¾ and 50¼ of the act, which limit the regulation by the commission of passenger stage corporations and highway common carriers to those operating "between fixed termini or over a regular route." Further, the first cited section excludes from its provisions "those whose operations are exclusively within the limits of a single incorporated city."

[2, 3] In the absence of legislative enactment conferring jurisdiction on the Railroad Commission to regulate taxicabs and to fix the rates thereof, we are satisfied that the City of Sacramento had the power to pass this ordinance under the police power granted by section 11 of article XI of the Constitution. The section provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." See, also, § 17 of Charter. The ordinance is confined in its effect to service performed within the city and it is not in conflict with general law. The regulation of jitneys has been held to represent a valid exercise of the police power of a municipality. In re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A. 1915F, 850. Decisions of other states support the conclusion that matters of this kind are within the police powers of cities. *Clem v. City of La Grange*, 169 Ga. 51, 149 S.E. 638, 65 A.L.R. 1361; *Yellow Taxicab Co. v. Gaynor*, 82 Misc. 94, 143 N.Y.S. 279, 289; *People v. Smith*, City Ct. Middletown, 15 N.Y.S.2d 459; *State v. Gamelin*, 111 Vt. 245, 13 A.2d 204; *Clem v. City of La Grange*, 169 Ga. 51, 149 S.E. 638, 65 A.L.R. 1364. In the *Smith* case, supra [15 N.Y.S.2d 460], it is said "Public interest is involved in taxicab operation and therefore is subject to municipal regulation." In 3 McQuillan, *Municipal Corporations*, 2d Ed., 240, section 993, it is stated that "Motor vehicles, autobusses or jitneys run for hire

are clearly within the range of necessary, appropriate and reasonable police regulations, and this of course is true of taxicabs so common in all cities and towns." The efficient and safe operation of taxicabs is a matter of concern to the people of a city and the regulation thereof and the fixing of rates contributes to the maintenance of safe standards of service. The state not having occupied the field, municipalities may do so in the exercise of the police power.

The writ is discharged and the petitioner is remanded to custody.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



22 Cal.2d 226

**FERNELIUS et al. v. PIERCE et al.**

S. F. 16768.

Supreme Court of California.

May 18, 1943.

Rehearing Denied June 14, 1943.

**1. Officers ⇨71, 116**

Public officials' power to suspend or discharge their subordinates and start proceedings to remove them from civil service lists carries with it correlative duty to exercise such power vigilantly, and such officials' negligent failure to act leaves them answerable in damages to persons suffering loss proximately resulting from such negligence.

**2. Pleading ⇨214(1)**

All factual matters alleged in complaint are confessed as true by demurrers thereto.

**3. Master and servant ⇨300**

**Municipal corporations ⇨170, 182**

Under "respondeat superior" rule, master is liable for torts committed by his servants within course of their employment, though master is without fault, and such rule is inapplicable in action against city manager and police chief to recover damages for death of city jail prisoner as result of beating by city police officers on theory of defendants' negligent failure to

suspend or discharge such officers for unfitness and incompetency known to defendants. St.1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4) b, c, §§ 81, 89; Pen.Code, § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondent Superior".

#### 4. Negligence ⇨22

Generally, it is "negligence" to use an instrumentality, whether a human being or thing, which user knows or should know is so incompetent, unfit, inappropriate, or defective that its use involves unreasonable risk of harm to others.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

#### 5. Officers ⇨118

Generally, superior public officers are not liable for their subordinate public employees' torts, unless such officers directed or personally co-operated in subordinates' acts or failed to use ordinary care in selection or discharge of subordinates whom such officers had power to appoint.

#### 6. Municipal corporations ⇨170, 182

A city manager and police chief, negligently failing to exercise their power under city charter to suspend or discharge city police officers, known by such manager and chief to be unfit and vicious, became liable in damages for death of city jail prisoner as proximate result of beating by such officers. St.1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4)b, c, §§ 81, 89; Pen. Code, § 681.

#### 7. Master and servant ⇨300

One's permission of act which he knows is impending and has power and duty to prevent is equivalent to direction thereof so far as legal responsibility therefor is concerned.

#### 8. Municipal corporations ⇨170, 182

A city manager and police chief, failing to exercise their power under city charter to suspend or remove police officers known to be incompetent and unfit, became liable in damages for death of city jail prisoner as proximate result of beating by such officers, though they had right of appeal to civil service board, which had ultimate power to affirm or overrule such superior officers' orders. St. 1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4)b, c, §§ 81, 82, 89; Pen.Code, § 681.

#### 9. Municipal corporations ⇨170, 182

In action against city manager and police chief to recover damages for death of city jail prisoner as result of beating by city police officers on ground of defendants' negligent failure to suspend or remove such officers because of their known unfitness and incompetency, no presumption can be indulged that city manager would have overruled police chief's order suspending such officers or that civil service board would have restored them to duty after their discharge by city manager. St. 1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4)b, c, §§ 81, 82, 89; Pen.Code, § 681.

#### 10. Municipal corporations ⇨173(1), 182

The surety on bond to indemnify city and its officers against loss occasioned by any officer's or listed employee's failure to perform their duties was liable thereon for damages because of city jail prisoner's death as result of beating by police officers, whom city manager and police chief negligently failed to suspend or discharge for known unfitness and incompetency, as authorized by city charter, in view of statute declaring bonds given by officers of cities governed by freeholders' charters obligatory on principals and sureties for use and benefit of all persons injured by such officers' wrongful acts or defaults. St. 1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4)b, c, §§ 81, 89; Pol.Code, § 961; Pen. Code, § 681.

#### 11. Municipal corporations ⇨173(5), 182

The statute declaring bonds of officers of cities governed by freeholders' charters obligatory on principals and sureties for use and benefit of all persons injured by such officers' wrongful acts or defaults applies to bond to indemnify city and its officers against losses occasioned by other officers' failure to perform their duties, so as to authorize action against surety on such bond to recover damages from city manager and police chief for death of jail prisoner as result of beating by city police officers on ground of defendants' negligent failure to exercise their power under city charter to suspend or remove such officers as unfit and incompetent. St.1911, p. 1552, § 2; St.1931, pp. 2649, 2650, 2653, 2654, 2665, § 17, § 27, subds. (2), (4)b, c, §§ 81, 89; Pol.Code, §§ 947 et seq., 955, 961; Pen-Code, § 681.

#### 12. Municipal corporations ⇨173(1)

The fact that city manager's bond is not specifically payable to state, as re-



quired by statute, constitutes no defense to action thereon to recover damages for death of jail prisoner as result of beating by city police officers on ground of city manager's failure to suspend or remove such officers for unfitness and incompetency, as authorized by city charter, in view of statute providing that official bond is not void, so as to discharge officer and his surety, because of omission of substantial matter or conditions required by law or defects in approval or filing of bond. Pol. Code, §§ 958, 963; St.1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4)b, c, §§ 81, 89; Pen.Code, § 681.

### 13. Pleading ⚡307

In action against city manager, police chief, and surety on their bond to recover damages for death of jail prisoner as result of beating by city police officers on ground of defendant officers' negligent failure to suspend or remove such subordinate officers for unfitness and incompetency, as authorized by city charter, attachment of copy of bond to complaint was sufficient suggestion of any defect in form of bond to meet statutory requirements. Pol.Code, § 963; St.1931, pp. 2653, 2654, 2665, § 27, subds. (2), (4)b, c, §§ 81, 89; Pen.Code, § 681.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Lola Mae Fernelius and others against August Pierce, Bodie A. Wallman, and others for wrongful death of Fred Fernelius. From a judgment for defendant Wallman and certain other defendants, plaintiffs appeal.

Reversed and remanded with directions.

For prior opinion, see, Cal.App., 123 P.2d 910.

Johnson & Harmon and W. G. Harmon, all of San Francisco, Heber James Brown, of Oakland, and Wm. H. Henderson, of San Francisco, for appellants.

F. Bert Fernhoff, City Atty., John W. Collier, Asst. City Atty., and Hagar, Crosby & Crosby, all of Oakland, and Thomas E. Davis, of San Francisco, for respondents.

SCHAUER, Justice.

[1] This case squarely presents the question as to whether public officials are

liable in damages for injuries proximately resulting from their negligent failure to suspend or discharge known unfit and vicious subordinates, the officials having notice of the subordinates' unfitness and viciousness and having the power to suspend and remove them subject, however, to review by a civil service board. We conclude that the power to suspend or discharge the subordinates from duty and to start proceedings for their removal from civil service lists carries with it the correlative duty to vigilantly exercise the power, and that the negligent failure of such officials to act leaves them answerable in damages to persons who have suffered loss proximately resulting from such negligence.

[2] This is an appeal by plaintiffs from a judgment in favor of certain defendants entered upon an order sustaining their demurrers to the complaint without leave to amend. All factual matters related herein are taken from the complaint, and by the demurrers and for the purposes thereof are confessed by the defendants to be true.

Plaintiffs Lola Mae Fernelius, Ardella Fernelius, Donald Fernelius and Ralph Fernelius are the infant children, and Mable Fernelius is the widow, of Fred Fernelius, deceased. The latter, while he was a prisoner in the Oakland City Jail, was so viciously and bestially assaulted and beaten by certain Oakland city police officers (defendants August Pierce and Glen Hancock) as to cause his death on the following day.

### *The Pleading*

No question is raised as to the sufficiency of the pleading against the killers themselves, but it also seeks to state a cause of action against their superior officers, John F. Hassler and Bodie Wallman, who at all times concerned were, respectively, the city manager and the chief of police of the City of Oakland, and against their bondsman. The manager, the chief of police and the bondsman challenge its sufficiency. Pertinent to their responsibility in the premises is the complaint alleges:

*As to City Manager Hassler:* That "as said city manager he was and is responsible for the proper and efficient administration of all the affairs of the city, and, subject to the civil service provisions, had at all times herein mentioned the power to appoint, discipline and remove all directors or heads of departments, all the chief offi-

cials and all subordinate officers and employees of the city responsible to him; that defendants August Pierce and Glen Hancock as police officers of the City of Oakland were responsible to him, the said city manager; that as the city manager said defendant John F. Hassler had at all times herein mentioned the power, subject only to the civil service provisions as aforesaid, to remove all police officers, and specifically defendants August Pierce and Glen Hancock, at any time he found them unfit or incompetent to perform their duties as police officers of the City of Oakland, or for misconduct or incompetency in the performance of their duties. That the civil service provisions to which the power of defendant John F. Hassler as said city manager was and is subject to as aforesaid, provide that all persons holding positions in the classified civil service shall be subject to suspension, fine and also to removal from office or employment, by order of the city manager, for misconduct, incompetence or failure to perform their duties, subject, however, to an appeal by the aggrieved party to the Civil Service Board within five days from the making of the order. That plaintiffs are informed and believe and on such information and belief allege the fact to be, that defendants August Pierce and Glen Hancock as police officers of the City of Oakland held at the times herein mentioned positions in the classified civil service of said City of Oakland."

*As to Chief of Police Wallman:* That "as chief of police of the City of Oakland \* \* \* [he] was at the times herein mentioned the chief executive of the police department of the said city, responsible for the execution of all laws, orders, rules and regulations of said department; that plaintiffs are informed and believe and upon such information and belief allege the fact to be that said defendant Bodie Wallman as chief of police of said City of Oakland had at all times herein mentioned the power and duty to appoint, discipline and remove defendants August Pierce and Glen Hancock for misconduct, unfitness and incompetence as police officers of said City of Oakland as aforesaid, subject in like manner to the civil service provisions that the power of defendant John F. Hassler is subject to as alleged. \* \* \*

*As to the Incompetence and Unfitness of the Subordinate Officers and Notice Thereof to the Superior Officials:* "That de-

fendants August Pierce and Glen Hancock were unfit and incompetent to perform their duties as police officers of the City of Oakland as follows, to wit: that said August Pierce and Glen Hancock were vicious, high tempered, and addicted to the use of unnecessary force and violence and likely to unlawfully assault, beat, wound, ill-treat and use unnecessary force and violence against any person in their charge as police officers of the said City of Oakland. That defendants Bodie Wallman and John F. Hassler prior to May 4, 1940, knew, or should have known in the exercise of due care, of the aforesaid incompetence and unfitness of defendant August Pierce and defendant Glen Hancock to perform their duties as police officers of the City of Oakland; that on the following occasions defendant August Pierce did unlawfully assault, beat, wound and abuse the following persons, who were in his charge as a police officer of the City of Oakland, in the following manner, to wit: that on or about December 24, 1939, said defendant August Pierce sheared off the finger of one Jose August by shutting a jail door on the same; that on or about February 4, 1939, said defendant beat and wounded one Kenneth Warner; that on or about August 9, 1938, said defendant August Pierce and defendant Glen Hancock beat with a stick or club one Edison Shumate so severely that it was necessary that he be sent to a hospital for treatment; that on or about December 13, 1937, said defendant August Pierce struck one Orval Rodgers with such force that his jaw was broken and that said defendant left him in his cell the said night of said December 13, 1937, without medical treatment of any kind; that on or about November 1, 1939, said defendant August Pierce beat and clubbed on the head one Howard Lyon; that on or about May 1, 1938, said defendant August Pierce beat and abused one Dee Otis Roberts; that on or about August 6, 1938, said defendant August Pierce beat and abused one Chuck Spencer; that on or about September 9, 1936, said defendant August Pierce struck one Marion P. Hughes in the face and stomach, knocking him against a wall. Plaintiffs are informed and believe and upon such information and belief allege the fact to be that the aforesaid beatings, woundings and abuses were reported to defendants Bodie Wallman and John F. Hassler who knew or should have known the same;

that said reports were made and said knowledge obtained before the aforesaid unlawful assault, beating and wounding of Fred Fernelius by August Pierce and Glen Hancock as aforesaid, which resulted in the death of the said Fred Fernelius as aforesaid; that plaintiffs do not know in what manner said reports were made or the exact dates the same were made, that these facts are within the peculiar knowledge of the defendants August Pierce, Glen Hancock, Bodie Wallman and John F. Hassler. That in spite of the fact that said defendants Bodie Wallman and John F. Hassler knew or should have known prior to May 4, 1940, that the defendants August Pierce and Glen Hancock were unfit and incompetent as aforesaid, they wholly failed and neglected to suspend, discipline or discharge said August Pierce and Glen Hancock, they having the power and the duty so to do as set out in paragraphs V and VI hereof, and thereby failed and neglected to well, truly, honestly and faithfully perform the duties of their respective offices."

*As to Presentation of Claim:* The complaint further alleges the timely presentation of a claim by all plaintiffs, for the wrongful death of the deceased, to the clerk of the City of Oakland, and to defendants Pierce, Hancock, Hassler, and Wallman, and the rejection thereof by all defendants.

*As to the Bondsman:* Allegations of the complaint pertinent exclusively to the bondsman are discussed later in this opinion.

#### *Statutory Law Governing Treatment of Prisoners*

Section 681 of the Penal Code of California provides that "It shall be unlawful to use in the reformatories, institutions, jails, State hospitals or any other State, county, or city institution any cruel, corporal, or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined \* \* \*. Any person who violates the provisions of this section \* \* \* shall be guilty of a misdemeanor."

#### *Pertinent Charter Provisions*

The Charter of the City of Oakland provides (Stats.1931, p. 2653) that the city manager, generally (subject to civil service provisions of the Charter), "shall have

the power to appoint, discipline and remove all directors or heads of departments, all the chief officials, and all subordinate officers and employees of the City responsible to him; but the Manager may, by means of written rules and subject \* \* \* to the civil service provisions when applicable, authorize the head of a department or office responsible to him to appoint, discipline and remove subordinates in such department or office." Section 27, subd. (2). The Charter further provides that (Stats.1931, p. 2654) "The City Manager shall have the power, and it shall be his duty: \* \* \* b. To act as the chief conservator of the peace within the City and to see that all laws and ordinances of the Council are duly enforced; \* \* \* c. Except as otherwise in this Charter provided, to supervise the administration of the affairs of the City." Subd. (4)b, c.

The civil service provisions of the Charter declare that (Stats.1931, p. 2665), "All persons holding positions in the classified civil service shall be subject to suspension, fine and also to removal from office or employment, by the City Manager \* \* \* for misconduct, incompetency or failure to perform their duties \* \* \* but subject to the appeal of the aggrieved party to the Civil Service Board \* \* \*. Any chief official \* \* \* may temporarily suspend any subordinate then under his direction for incompetency, neglect of duty or disobedience of orders, but shall within twenty-four hours thereafter report the facts in writing to the City Manager \* \* \*. The City Manager \* \* \* shall \* \* \* if demanded by the subordinate suspended, hear evidence for and against him, and shall thereupon affirm or revoke such suspension, according as he \* \* \* finds the facts to warrant." Section 81. There is also a provision (Stats. 1931, p. 2665) for appeal by a disciplined or removed civil service employee, within five days from the making of the order, to the Civil Service Board "which shall fully hear and determine the matter" and whose "finding and decision \* \* \* shall \* \* \* be enforced and followed." Section 82.

Likewise by the Charter it is enacted that (Stats.1931, p. 2665), "The Chief of Police shall be the chief executive officer of the [Police] Department and shall be held responsible for the execution of all laws and ordinances \* \* \*." Section 89.



*Plaintiffs' Theory of the Case and Its Differentiation from the Doctrine of Respondeat Superior*

[3] In the ensuing discussion, except as otherwise indicated, we refer to the respondents-defendants Hassler and Wallman (the city manager and the chief of police) as the defendants. Both plaintiffs and defendants unite in stating that plaintiffs' case is not laid on the doctrine of *respondeat superior*. Nevertheless much of the argument and most of the authorities cited to us deal with that doctrine because under it, and in the cases dealing with it, defendants find principles of law which they claim exculpate them from responsibility, and plaintiffs, in seeking to develop and delineate the theory they espouse, must deal with those principles and differentiate some of them in steering their course to the end of holding defendants liable in the premises. It is unnecessary for us to assert academically whether plaintiffs' cause of action relates at all to that doctrine or is wholly independent of it. However, a clear distinction between plaintiffs' theory and the typical one of *respondeat superior* is necessary at the outset.

Under the rule of *respondeat superior*, as ordinarily understood, the master is held liable for the torts of his servants committed within the course of their employment. In the typical case the neglect is only that of the servant; the master is himself without fault. But because the servant is engaged in the master's work and is doing it in place of, or for, the master, the act of the servant is regarded as the act of the master. Responsibility devolves up through the relationship to the master and the question of proximate cause of the injury relates only to the act (or neglect) of the servant. In the case now presented by plaintiffs, however, we have a basically different factual pattern. The *neglect* charged here was not that of the subordinate officers; they did what was reasonably to be expected of them in view of their known propensities. The *neglect* that is pleaded is that of the defendants themselves. The legal fault charged here as the ground of liability is directly and personally that of the superior officers (the defendants). Responsibility is not claimed to devolve up to them merely derivatively through a relationship of master and servant or principal and agent. The fact that the killer-officers were employees subor-

dinate to the defendants is essentially material here, not for the purpose of tracing responsibility for their acts up to defendants through the ordinary principles of agency but rather as showing that the homicidal officers were in effect an *instrumentality under the control of the defendants* in the handling of which the defendants were given and charged with responsibility and power, and the question of proximate cause of the injury relates directly to the neglect of the defendants. This theory would not operate to permit recovery from superior officers in an action against them for the tortious acts or omissions of their subordinates where the superior officers themselves were not at fault in a manner proximately connected with the injury.

[4] That as a general rule it is negligent to use an incompetent or unfit instrumentality there can be no question. The American Law Institute in its Restatement of the Law of Torts (vol. II, Negligence (1934), sec. 307, p. 833) states the rule as to responsibility for use of an incompetent instrumentality as follows: "It is negligence to use an instrumentality, whether a human being or thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others." By way of illustration the Institute states this case (at p. 834): "A, the proprietor of an apartment house, employs a janitor, B, a man whom A knows to be of an exceedingly fiery and violent temper. C, one of A's tenants, complains to B in regard to lack of heat. B becomes violently angry and attacks and harms C. Irrespective of whether B's act is within the course of his employment as janitor, A is liable to C."

*Defendants' Contentions*

[5] Defendants contend in effect that a principle (hereinafter stated) enunciated in *respondeat superior* cases dealing with claims against public officials for the acts or neglects of subordinates is controlling here, that such principle precludes recovery under that doctrine, and that if plaintiffs cannot recover on the *respondeat superior* theory they are wholly without remedy as against the superior officers.

*Law Points*

The principle so enunciated is stated as an exception to the *respondeat superior*

rule. It is the proposition that superior public officers generally are not liable for the torts of their subordinates where such subordinates are likewise public employees. Such exception to the rule is, however, generally stated with one or more exceptions to its own operation. In 21 California Jurisprudence, section 17, at page 405, the statement is: "Pursuant to settled rules, a public officer is not responsible for the acts or omissions of police officers employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless such officer has directed the acts to be done or has personally co-operated therein, or unless, having the power of appointment, he has failed to use ordinary care in the selection."

Likewise in *Michel v. Smith* (1922), 188 Cal. 199, 205 P. 113, asserted by both plaintiffs and defendants to be the leading case on the subject in this state, the rule is stated in varying language. At page 201 of 188 Cal., at page 114 of 205 P., it is declared as follows: "There is a well-defined exception to the general rule which renders one responsible in a civil action for the tortious acts of those employed by or under him. A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated therein." Again, at page 202 (of 188 Cal.), at page 114 of 205 P., it is stated, "He [a chief of police] may even be charged with the duty of selecting the members of the force, but he is not responsible for their acts, unless he has directed such acts to be done, or has personally co-operated in the offense, for each policeman is, like himself, a public servant." These "exceptions"—personal direction of, or cooperation in, the offense—obviously are personal faults of the superior. So also is failure to use ordinary care in the employment or discharge of a subordinate. Mr. Floyd R. Mechem in his book entitled "Public Offices and Officers" (1890, Callaghan and Company) lists more "exceptions" of the same character. He states the general rule and then says (sec. 790, p. 529): "But this general rule is subject to certain exceptions, important to be borne in mind and as well settled as the

rule itself. Thus the superior officer will be liable, (1) where, being charged with the duty of employing or retaining his subordinates, he negligently or wilfully employs or retains unfit or improper persons; \* \* \* or (3) where he so carelessly or negligently oversees, conducts or carries on the business of his office as to furnish the opportunity for the default; or (4) and *a fortiori*, where he has directed, authorized or co-operated in the wrong." Where the superior officer has the power and duty of removal of a subordinate, no logical reason appears why his responsibility for failure to discharge a known unfit subordinate should be any less than for initially employing such a person. The doctrine of responsibility of public officers for negligence in the appointment of a subagent was recognized in the case of *Baisley v. Henry* (1921), 55 Cal.App. 760, 763, 204 P. 399, 401. The court said: "The rule is that an agent is not, in general, liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or improperly co-operates in the latter's acts or omissions. (2 C.J. 829.) An application of this principle is found in the rule, uniformly recognized, that a public officer is not personally liable for the negligence of an inferior officer unless he, having the power of appointment, has failed to use ordinary care in the selection."

[6] We find no authority, case or text, in which a public officer is said to be exculpated from liability in a case such as that here pleaded. In stating the general rule of nonliability of public officers for the torts of their subordinates, case and text authors usually have been vigilant in their care not to imply immunization for such a case. Thus in the annotation in 12 A.L.R. at page 980, the language is: "According to both the early and the more recent cases it is well settled as a general rule, subject, however, to a number of exceptions, that *in the absence*\* of a statute imposing liability, or *of negligence on his part* in appointing or supervising his assistants, neither an officer nor his bondsman is liable for the defaults and misfeasances of assistants appointed by him, provided that the assistants \* \* \* become \* \* \* officers themselves, or servants of the public." Again, *Shearman and Redfield* in

\* Throughout this opinion emphasis within quotations has been added.

their text on Negligence (Baker, Voorhis & Co., Inc., 1941, revised ed., vol. 2, sec. 330, p. 805) state, "All public officers who have the power of appointing their subordinates are bound to exercise ordinary care in selecting proper persons for the position, and to superintend their conduct; and they are bound not to assign to them tasks for which they know such subordinates to be incompetent, and in the execution of which it is reasonable to infer that disastrous consequences will ensue."

In American Jurisprudence (43 Am.Jur., sec. 281, pp. 94, 95) the rule is stated in language almost identical with that quoted herein from the annotation in American Law Reports, Annotated, and it is further declared: "And where an officer fails in a duty to take action, liability may be predicated on nonaction after knowledge of the negligence of subordinates has come to his attention." In Strickfaden v. Greencreek Highway Dist. (1926), 42 Idaho 738, 763, 248 P. 456, 463, 49 A.L.R. 1057, 1071, the court said: "The rule of *respondeat superior* does not apply where public officers are sought to be bound by the negligence of subordinate officers or employees, unless there has been a failure to exercise due care in the selection of such subordinates, or the officers have knowledge of the negligent acts of the inferior officers." To the same effect is Doeg v. Cook (1899), 126 Cal. 213, 58 P. 707, 77 Am.St.Rep. 171, and the rule is impliedly recognized by this court in Hilton v. Oliver (1928), 204 Cal. 535, 269 P. 425, 61 A.L.R. 297, wherein Mr. Justice Shenk, speaking for the court, scrupulously avoids a contrary implication in disposing of a case wherein there was evidence of negligence by employees but not by the superiors. The opinion specifically points out (page 539 of 204 Cal., page 426 of 269 P.) that "there was no evidence whatever in the record, either directly or by reasonable inference that the defendant trustees knew anything at all about such [the negligent] action on the part of said employees in doing the work," and then (page 540 of 204 Cal., page 426 of 269 P.) holds: "As the record herein does not disclose that the defendant trustees directed or co-operated in or knew of the alleged acts of negligence on the part of the subordinate agents and employees of the district, or were at all remiss in the matter of their appointment, the evidence was wholly insufficient to support the verdict." In the same case this court also recognized the

distinction between the doctrine of *respondeat superior* and the theory of direct, personal negligence which plaintiffs invoke in the case at bar. The court in distinguishing the cases of Perkins v. Blauth (1912), 163 Cal. 782, 127 P. 50, and Proper v. Sutter Drainage Dist. (1921), 53 Cal. App. 576, 200 P. 664, from the case then under consideration says (204 Cal. at page 540, 269 P. at page 427): "In neither case was the doctrine of *respondeat superior* applied or applicable, for negligence *was brought home to the trustees themselves.*" (Italics ours.)

The case of Hale v. Johnston (1918), 140 Tenn. 182, 203 S.W. 949, an action against county commissioners and others to recover damages for beatings resulting in the death of a prisoner, presents a factual and legal situation pertinently similar to the case before us. There was there, as there is here (Pen.Code, sec. 681), a statute prohibiting corporal punishment of prisoners. The Supreme Court of Tennessee said (page 192 of 140 Tenn., page 951 of 203 S.W.): "The negligence averred against the defendant commissioners is: (1) That a custom of brutally beating and maltreating prisoners by the foreman and guards obtained at the county workhouse as a part of its discipline for many years; (2) defendants knew, or by the exercise of ordinary care could have known, of this cruel and inhuman custom, and of consequence knew, or could have known, of the killing of deceased; and (3) so knowing, in fact or in law, they took no steps to prevent the death of deceased. \* \* \*

"[P. 200 of 140 Tenn., page 953 of 203 S.W.] From what has been said, it naturally follows that the failure of defendants to discharge their duties in the premises was the proximate cause of the punishment inflicted upon deceased. If they had been diligent to see that corporal punishment was not practiced as a part of the discipline of the workhouse, it is apparent that deceased would not have been killed in the manner in which he was. This is different from the case of an outbreak of temper upon the part of a guard, followed by a blow which takes the life of an inmate. For this we apprehend defendants would not be liable. But the case made by plaintiff, both in the declaration and in the proof, is that corporal punishment was a part of the system of discipline of the workhouse, and was constantly practiced



in the most brutal ways for many years, and that defendants knew, or by the exercise of ordinary care could have known, of its existence."

In *Michel v. Smith*, supra (1922), 188 Cal. 199, 205 P. 113, this court was dealing only with the general rule of nonresponsibility of public officers for the acts or omissions of their subordinates. It had no occasion to consider, formulate, or express any such exception to the rule as that which is now suggested. Indeed, the statement of the exceptions noted in the rule as there declared was but incidental to the application of the general rule. The court held that under the Charter of the City of Los Angeles the police chief and a sergeant of police, who gave no specific or even general directions concerning the arrest of the plaintiff, would not be liable for his unlawful arrest by subordinate officers (his arrest actually was held not unlawful). There was no contention, however, in that case that the chief of police and the sergeant knew that the arresting officers intended to make an unlawful arrest and, having that knowledge and the power and duty to prevent the unlawful act, that they negligently stood by and permitted it to take place. The court obviously did not make any pronouncement upon any such factual situation as that last depicted. It (the last depicted situation) is more nearly the one that is now before us.

[7] We are of the opinion that permitting an act, where one has knowledge that it is impending and has the power and duty to prevent it, is the equivalent of directing it, so far as legal responsibility therefor is concerned.

[8] Defendants contend that they should not be held accountable for failing to suspend or remove the known incompetent and unfit officers because such officers had a right of appeal to the civil service board and such board had the ultimate power to affirm or overrule their orders. They urge, in other words, that they should not be held responsible unless they had the *wholly unrestricted* power to employ and discharge subordinates. In support of this thesis they cite *Union Bank & Trust Co. v. Los Angeles County* (1938), 11 Cal.2d 675, 679, 81 P.2d 919, 921, wherein it is stated that "It may be conceded that in the absence of statute the modern view is opposed to making public officers civilly liable for torts of deputies, where the lat-

ter are themselves statutory officers and not under the superior's unrestricted control or right of hiring and discharging." Careful reading of the quotation itself discloses that it is not pertinent to the case before us. This court there was dealing with the question of holding a superior officer liable for the tort of a deputy purely under the doctrine of *respondeat superior* where no personal neglect of the superior, proximately causing the loss, was alleged. There is no implication that the ruling was intended to apply in a case where the superior officer had himself been negligent. Indeed the opinion recites (page 678 of 11 Cal.2d, page 921 of 81 P. 2d) that "the county clerk did not himself commit any wrongful act." That case was an action against a county clerk to recover money which had been embezzled by a deputy. It was not pleaded or contended that the deputy had theretofore repeatedly embezzled money entrusted to him and that his superior officer knew that he had repeatedly embezzled money and in all probability would do so again if given the opportunity, and that with such knowledge the superior, having the exclusive power and duty to discharge him, subject only to review by a civil service board, negligently or wilfully retained him in a position where he would have the opportunity to indulge his kleptic propensity. Had those things recited as not pleaded been pleaded, we entertain no doubt that a contrary conclusion would have been reached in that case. Their equivalents are alleged in the case now before us.

The several other cases cited by defendants enunciating in varying language the proposition stated in the *Union Bank & Trust Co.* case (supra, 11 Cal.2d 675, 81 P.2d 919) are all equally subject to differentiation from the case we are considering. In *Van Vorce v. Thomas* (1937), 18 Cal. App.2d 723, 726, 64 P.2d 772, 773, the District Court of Appeal recited typical facts as to the personnel organization of a large office, but containing no implication of negligence on the part of the head of the office, and declared, "Under such circumstances, to make the head of the office respond in damages for the negligent discharge of duties, which he has no choice but to delegate to others, becomes 'manifestly unjust.'" But certainly it is not "manifestly unjust" to hold a superior officer to reasonable diligence in the discharge of his own duties.

It is a reasonable inference that the consequences flowing from the neglect of the defendants were to be apprehended by them as likely to result therefrom. A trier of the fact might well conclude that the warning implicit in the pleaded conduct of police officers Pierce and Hancock was more shockingly imperative in its demands for affirmative action than words could be. One could perhaps doubt that a human being, though he avowed his intent in words, would at the test be depraved enough to carry into execution the conduct alleged. But if it were known, as averred here, that there were persons who actually possessed and indulged such propensities, the deliberate toleration of such persons on a police force by those having such knowledge and the power and duty to remove them appears to be without legal justification. It is a specious argument which would immunize any officer or employee for neglect to perform his own clear duty merely because potentially his *proper* act *could* be rendered nugatory by the *improper* act of a board or officer having a higher authority. Particularly is this true where, as here, the power and duty to initiate the basic and effective action *are vested exclusively in the officers sought to be charged*. In the Charter of the City of Oakland no provision has been called to our attention under which the unfit officers could have been removed except by action of these defendants, and it has not been suggested that any officers other than defendants owed any duty or had the power to remove them.

The law giving to a superior officer the power to suspend or remove subordinates would be little more than a contribution to the ego of the superior if it did not likewise place on him the correlative duty of vigilantly exercising that power in the protection of the public interest. Against bestiality and brutality by police officers of the type depicted in this case the public has no adequate protection unless the superiors are answerable for any lack of vigilance in the discharge of their duty. There is no more reason for excusing negligent failure to perform a *restricted duty*, if such duty faithfully performed would, in the ordinary course of events, *be adequate to prevent the damage*, than there is for excusing such failure to perform an *unrestricted duty*.

[9] The argument that the city manager might have overruled the chief of

police if he had acted to suspend the unfit officers, or that the Civil Service Board might have restored them to duty after discharge by the city manager, is but speculation based on an unsound premise—the premise that the manager or board is presumed to act improperly after previous proper action by the party primarily charged with the duty. No such presumption can be indulged. It follows that a cause of action is stated as against defendants Hassler and Wallman.

### *Liability of the Bondsman*

[10] The complaint further alleges the execution of a bond by the defendant Fidelity and Deposit Company of Maryland by the terms of which it undertook, in the sum of \$50,000 as to defendant Hassler and \$5,000 as to defendant Wallman, "to indemnify and hold harmless the City of Oakland \* \* \* and/or its officers \* \* \* as their respective interests may appear against any loss occasioned by the failure on the part of any officer and/or employee listed in the schedule hereto attached and made a part hereof \* \* \* to well, truly, honestly and faithfully perform all of the duties that are now or may hereafter be required of them and/or either of them by any law of the State of California and/or any ordinance of the City of Oakland and/or required by the City Manager or other chief official or departmental head. \* \* \*"

Defendant surety company adopted the argument of the defendants Hassler and Wallman that they were not responsible in the premises and in addition contends that it is not liable to plaintiffs for defendants' default because of the form and substance of the instrument executed and the law governing its conditions. Such contention is not tenable.

In presenting its position the defendant surety company emphasizes that the instrument executed by it states an agreement "to indemnify and hold harmless the City of Oakland \* \* \* and/or its officers and/or councilmen" against loss but does not purport to run in favor of any other obligee. However, section 961 of the Political Code provides that "Every official bond, given pursuant to law, executed by any officer of the state, or of any county or any subdivision thereof, or of any town or city organized under the provisions of this code, *or by any officer of a city or county governed by a freeholders' charter,*

*is in force and obligatory upon the principal and sureties therein to and for the state of California, or such municipal corporation, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof.*" (Italics ours.) That section, salutary in its public benefit, was in force at the time the instrument in question was executed and, if applicable at all, must be deemed a part of the contract the same as though its terms had been written therein. (Brown v. Ferdon (1936), 5 Cal.2d 226, 230, 54 P. 2d 712; Hales v. Snowden (1937), 19 Cal. App.2d 366, 369, 65 P.2d 847; Mueller v. Elba Oil Co. (1942), 21 Cal.2d 188, 204, 130 P.2d 961.) If the quoted section (Pol. Code, § 961) is applicable, plaintiffs are entitled to sue on the bond.

[11] Defendant surety company says that the section is not applicable because the bonding of city officers is a municipal affair and the Oakland City Charter provides for a bond conditioned in favor of the city but not in favor of its citizens. It relies upon *Sunter v. Fraser* (1924), 194 Cal. 337, 228 P. 660, and *Municipal Bond Co. v. City of Riverside* (1934), 138 Cal. App. 267, 32 P.2d 661. The first cited case (*Sunter v. Fraser*) contains the statement (at page 340 of 194 Cal., at page 660 of 228 P.), "appellants point out that section 961 is a part of article 9, which covers the subject of official bonds to be given by state, county and township officers only (*Rowe v. Rose*, 26 Cal.App. 744, 745, 148 P. 535)." Obviously an error crept into that statement. *Rowe v. Rose* (1915), 26 Cal.App. 744, 148 P. 535, cited as authority, merely mentions (at page 745 of 26 Cal.App., at page 536 of 148 P.) that "under section 950, Political Code, the official bonds required to be filed with the county clerk are those of 'county and township officers.'" (Italics ours.) Article 9 of chapter 7, title 1, part 3, of the Political Code covers bonds of public officers generally, city as well as state, county and township (see Pol.Code, §§ 955, 961).

In the case of *Municipal Bond Co. v. City of Riverside*, supra, (1934) 138 Cal. App. 267, 32 P.2d 661, the District Court of Appeal held that under the wording of the Charter there involved the city had "expressly declared its independence from

the control of general laws as to municipal affairs" (138 Cal.App. at page 278, 32 P.2d at page 665) and that section 961 of the Political Code did not operate to give a right of suit maintenance to any person other than the obligee named. In that case, however, according to the opinion (138 Cal.App. at page 276, 32 P.2d at page 664), the Charter declared in the city the power "To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter." (Italics ours.) That Charter also declared (see page 277 of the opinion, 32 P.2d page 665) that "The form and conditions of all official bonds, the affidavits and justification thereon, shall be as is required by the general laws of the state in force at the time such bonds are given." The District Court of Appeal held that (138 Cal.App. at page 277, 32 P.2d at page 665) "the conferring of a right of action upon one other than the obligee designated in the bond has no bearing upon the form of the bond" and that "Nor do we think that the giving of a right of action may properly be denominated a condition of the bond."

The provisions of the Oakland City Charter are, however, definitely different from those the District Court of Appeal dealt with in the case cited. Whereas the Riverside Charter asserted the right "to make and enforce all laws \* \* \* in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter," St.1929, p. 2104, art. 1, § 3, the Oakland Charter declares (Stats. 1911, vol. 2, p. 1552), "The city of Oakland shall have, exercise and enjoy all the rights, immunities, powers, benefits, privileges and franchises now possessed, enjoyed, owned or held by it; and shall be subject to all the duties and obligations now pertaining to or incumbent on said city as a corporation *not inconsistent with the provisions of this charter.*" Section 2. (Italics ours.) Specifically, as to official bonds the Charter provides (Stats.1931 pp. 2649, 2650) that "The Mayor, Auditor, Treasurer, each Councilman and each School Director shall before entering upon the duties of his office, each give and execute to the City a bond as hereinafter provided. \* \* \* The bond of the Mayor and of each Councilman shall each be in the penal sum of Ten Thousand Dollars \* \* \*. The amount of the bond required of the City Manager shall be



fixed by the Council at not less than Fifty Thousand Dollars (\$50,000). *Every bond shall contain the condition that the principal will well, truly, honestly and faithfully perform the duties of his office.* \* \* \* All the provisions of the law of the State relating to official bonds of City officers, not inconsistent with this Charter, shall be complied with." Section 17. (Italics ours.)

There is nothing in the foregoing Charter provisions which is inconsistent with the right of plaintiffs to sue under section 961 of the Political Code, and there is nothing in the last mentioned section which is inconsistent with the Charter insofar, at least, as it applies to the official bond of the city manager and the chief of police. The requirement that the bond be given to the city is not inconsistent with the right of individual persons, aggrieved by a city officer's neglect, to sue thereon. But it is also noteworthy that *the city manager's bond is not one of those which is specifically required to be executed "to the City."* (And the same is true as to the bond of the chief of police.) Only the "Mayor, Auditor, Treasurer, each Councilman and each School Director" are listed as being required by the Charter to "give and execute *to the City* a bond as hereinafter provided." The only specific Charter reference to the bond of the city manager is that "The amount of the bond required of the City Manager shall be fixed by the Council at not less than Fifty Thousand Dollars (\$50,000)." Furthermore, the provision that "*Every bond shall contain the condition that the principal will well, truly, honestly and faithfully perform the duties of his office*" seemingly contemplates the execution of bonds in different forms with the requirement, however, that *all*, of whatever form, shall contain the specified condition. The above quoted provisions, coupled with the declaration that "All the provisions of the law of the State relating to official bonds of City officers, not inconsistent with this Charter, shall be complied with," evidences the intent that the provisions of article 9 of chapter 7, title 1, part 3, of the Political Code shall be applicable and complied with, at least as to the city manager's (and the police chief's) bond.

[12,13] As to the substance and form of the contract executed by the surety company here, it must be construed in the light not only of section 961 of the Political Code, above quoted, but also in view of

the beneficent and remedial language in section 963 of the same code: "Whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and his sureties; but they are equitably bound to the state or party interested; and the state or such party may, by action in any court of competent jurisdiction, suggest the defect in the bond, approval, or filing, and recover the proper and equitable demand or damages from such officer and the persons who intended to become and were included as sureties in such bond." As the provisions of law heretofore quoted must be deemed to constitute a part of the contract of the surety, the fact that the bond of the manager is not specifically payable to the State of California, as required by section 958 of the Political Code, does not constitute a defense. (Hubert v. Mendheim (1883), 64 Cal. 213, 218, 30 P. 633; Wood v. Lehne (1938), 30 Cal.App.2d 222, 225, 85 P.2d 910.) If the bond were to be deemed defective in form the fact that a copy of it is attached to the complaint is a sufficient suggestion of such defect to meet the requirements of the statute. (People v. Huson (1889), 78 Cal. 154, 157, 20 P. 369.)

So far as liability on the bond of defendant Wallman is concerned, it is to be observed that the chief of police is not one of the officers specifically mentioned in the Charter provision governing official bonds and the discussion of the subject in relation to the defendant Hassler is determinative of it in relation to defendant Wallman.

The judgment is reversed and the cause is remanded to the superior court with directions to overrule the demurrers of the defendants Bodie A. Wallman, John F. Hassler and Fidelity and Deposit Company of Maryland, a corporation.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, J., concurred in the judgment.

SHENK, Justice (concurring).

I concur in the judgment of reversal on the ground that the allegations of the complaint are sufficient to require the defendants Hassler and Wallman to answer, particularly the allegations of prior knowledge

on their part of the vicious propensities of the malefactors, Pierce and Hancock, and of failure to institute timely disciplinary proceedings against them. These allegations, the truth of which is admitted for the purposes of the demurrer, bring the case fairly within the rules announced in *Michel v. Smith*, 188 Cal. 199, 205 P. 113, 115, and similar cases. The civil service provisions of the Oakland City Charter are in essential respects the same as the provisions of the Los Angeles City Charter involved in the *Michel* case. A sound public policy supports the general rule of non-liability of superior public officers for the torts of inferior civil service officers and employees and exceptions to that rule should not be extended; otherwise the assumption of public office with liability for the misdeeds of inferiors occupying civil service positions, many times numbering thousands, would indeed be a hazardous undertaking.



58 Cal.App.2d 752

**ALONSO et al. v. BADGER.****STANFORD v. ALONSO et al.**

Civ. 13967.

District Court of Appeal, Second District,  
Division 1, California.

May 25, 1943.

Hearing Denied July 22, 1943.

**1. Appeal and error** Ⓒ931(1)

On appeal evidence will be viewed in light most favorable to findings and judgment predicated thereon.

**2. Appeal and error** Ⓒ1008(1)

Findings cannot be overthrown unless they cannot be supported by the testimony.

**3. Factors** Ⓒ43

Where broker on whom draft in payment for lambs was drawn refused to pay draft and paid proceeds of sale of lambs to a third party claiming a contract relationship with sellers who refused to turn over proceeds to sellers, in action by latter against broker, evidence sustained finding

that at time the lambs were resold by broker, broker knew that draft it had delivered to dealer had been delivered to the sellers as owners in payment of the lambs sold.

**4. Principal and agent** Ⓒ23(5)

Where broker on whom draft in payment for lambs was drawn refused to pay draft and paid proceeds of lambs to a third party claiming a contract relationship with sellers who refused to turn over proceeds to sellers, in action by latter against broker, evidence sustained finding that third party to whom broker's representative paid proceeds of lambs was not the agent of the sellers to receive such proceeds. Civ.Code, § 1738 et seq.

**5. Sales** Ⓒ202(1)

Where title to lambs was to pass under bill of sale attached to draft drawn by purchasing dealer on livestock commission broker on payment of draft, transaction was a "cash sale" as distinguished from "sale on credit" and broker refusing to pay draft acquired no title to lambs since in cash sale title and right to possession remain in seller until price is paid. Civ. Code, § 1738 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Cash Sale" and "Sale on Credit".

**6. Factors** Ⓒ38

Where title to lambs was to pass under bill of sale attached to draft drawn by purchasing dealer on livestock commission broker on payment of draft and payment of draft was refused by broker, broker's sale of lambs without sellers' consent amounted to a "conversion". Civ.Code, § 1738 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

**7. Factors** Ⓒ38

Where broker on whom draft drawn by dealer in payment for lambs refused to pay draft and paid proceeds of lambs to third party claiming a contract relationship with sellers, who refused to turn over the proceeds to sellers, and there was substantial evidence that broker received lambs from sellers thereof and that dealer negotiating purchase was not agent of sellers but of broker in negotiating the sale, contention of broker that he having received lambs from dealer as principal was bound

to pay proceeds of sale to person to whom proceeds were paid, could not be maintained. Civ.Code, § 1738 et seq.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Andres Alonso and others against E. C. Badger, doing business as Badger Livestock Commission Company, and F. E. Stanford to recover the value of lambs, wherein last-named defendant filed a cross-complaint against plaintiff and one John Montes. From an adverse judgment, first-named defendant appeals.

Affirmed.

Paul D. Holland and Edward Flam, both of Los Angeles, for appellant.

Francis B. Cobb and Charles M. Walker, both of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs commenced this action against defendants to recover the value of some 548 head of lambs allegedly sold for the sum of \$2,740. For reasons that will hereinafter appear, defendant Stanford filed a cross-complaint wherein he joined one John Montes as a party. The issues framed by the cross-complaint are not before us on this appeal for the reason that cross-defendant Montes defaulted and judgment was entered against him and in favor of defendant and cross-complainant Stanford for \$2,590. At the trial upon the issues raised by plaintiff's complaint and defendant's answer the court rendered judgment in favor of the former for \$2,740. From such judgment defendant E. C. Badger, doing business as Badger Livestock Commission Company (hereinafter referred to as Badger), alone prosecutes this appeal.

As to the factual background surrounding this litigation, the record discloses that appellant Badger is a licensed livestock commission broker operating at the Union Stockyards in Los Angeles. Defendant Stanford is a livestock dealer, carrying an account with appellant Badger and using the latter's brokerage facilities, which permitted him when purchasing livestock from various growers to execute a draft drawn on appellant Badger, on a printed form of draft furnished by the latter, with a bill of sale attached, wherein title to the livestock purchased by the defendant was conveyed to appellant Badger. The latter

would pay the draft, receive the bill of sale, then in turn sell the livestock to a packing company; would receive payment from such packing company, after which payment he would charge the account of the dealer Stanford with his commission, for the amount of the draft, trucking and other expenses, and then credit his account with the amount realized from the sale to the packing company.

Respondents herein are sheep growers in the vicinity of Tia Juana, Mexico.

[1] In narrating the testimony with reference to the particular transaction with which we are here concerned, we shall set forth the evidence in a light most favorable to the findings made by the court and the judgment predicated thereon as we are required to do on appeal, where every intendment is in favor of the findings made. Bearing this rule in mind we think it may fairly be said that contained in the record is evidence that on May 8, 1941, defendant Stanford selected from the flocks of respondents 548 head of lambs. There is evidence that cross-defendant Montes and respondents Izuel and Alonso participated in such selection, but the presence of Montes upon this occasion is denied by respondent Izuel. The lambs were loaded on trucks and the parties met at the border near Tia Juana, Mexico, to complete the transaction. A charge of \$3 per head as duty was required to be paid to the customs authorities, and after defendant Stanford had telephoned appellant Badger's office the broker wired the requisite sum for payment of the duty charges. When the lambs were delivered at the border, defendant Stanford had a conversation with respondents Alonso and Izuel, at which conversation, according to Stanford, cross-defendant Montes was present. However, in view of what we shall have to say later in this opinion, it becomes important to here note that the presence of Montes at this conversation was denied by respondent Izuel, thereby creating a conflict in the evidence as to who were the actors upon this occasion. In such conversation defendant Stanford inquired as to whom he should make payable the purchase draft drawn on appellant Badger and after some discussion was told to make the draft payable to respondent Alonso. Thereupon Stanford executed and delivered a draft drawn upon appellant Badger in favor of respondent Alonso for the sum of \$2,740. This draft was attached to a



bill of sale signed by respondent Alonso in favor of appellant Badger, and the customs broker's receipt for the importation of the lambs was also made to appellant as purchaser.

There is in the record testimony that prior to taking delivery of the lambs defendant Stanford complained to cross-defendant Montes, but not to any of the respondents herein, concerning the quality of the livestock as "fat lambs" under the claimed terms of the contract, and finally upon Montes' insistence and because of his desire to earn a claimed 50¢ per head commission that would accrue to him and one of his associates under their contract with respondent growers, Montes agreed with Stanford that the latter should take some of the lambs that did not measure up to the contract regulations upon condition that Montes would share any loss Stanford might sustain on the transaction. As far as we can learn from the record, however, respondents according to their testimony were not parties to any such agreement.

The lambs were ultimately delivered to the pens of Swift & Company in Los Angeles for resale to that company on the basis of a previous agreement with them made by defendant Stanford. However, Swift & Company refused to accept the lambs because of their claimed inferior quality and asked Stanford to remove them. Thereupon Stanford negotiated with Swift & Company's representative and finally induced the latter to accept the lambs at a reduced price which resulted in a net loss of \$304 on the transaction. At about this time defendant Stanford communicated with appellant's office manager, advising her concerning the outstanding draft in favor of respondent Alonso for \$2,740, and directed her not to pay it, but to make a settlement with cross-defendant Montes who would come to Los Angeles to receive the balance of the purchase price less the settlement to be agreed upon. Thereafter cross-defendant Montes did come to Los Angeles at the suggestion of defendant Stanford and a settlement was negotiated with him under the terms of which he assumed \$150 of the \$304 loss on the shipment. Appellant thereupon paid Montes in the sum of \$2,590 representing the reduced purchase price of the lambs, less duty and less the settlement of \$150. It is agreed that this money paid by appellant to cross-defendant Montes was not turned over by him to respondent sellers

of the lambs, Montes claiming the right to certain offsets for debts allegedly due him, but admitting the receipt by him of the money.

The draft for \$2,740 executed by defendant Stanford, drawn on appellant Badger and delivered to respondents at the border, was presented to appellant on May 10th and the latter declined to pay the same and it was returned unpaid.

[2, 3] Appellant first assails as unsupported by the evidence the court's findings that "at the time such lambs were sold to Swift and Company, Badger Livestock Commission Company knew that the draft they had delivered to Stanford, as hereinabove in the findings found, had been delivered to the plaintiffs as owners in payment for the said 548 head of lambs". While it is true as contended by appellant that the latter's office manager testified that the first she knew that the draft in favor of respondent Alonso had been made and delivered was after the lambs had been delivered to Swift & Company and when defendant Stanford telephoned and instructed her not to pay the defendant, nevertheless she also testified "Well, I had seen the original contract where he purchased them from Alonso, which was made with Montes, the original contract called for the purchase price of \$8 per head, I don't remember that Stanford told me the number of head that he was buying, but I knew he was buying them." Furthermore, the evidence shows that defendant Stanford called appellant on the telephone, advised him of the number of lambs that had been purchased from respondents and appellant wired \$3 per head to pay the customs duty on the 548 head of lambs. Also, the evidence clearly shows that it was the custom and practice of appellant and defendant Stanford to handle the purchase of livestock through Stanford negotiating the sale with stock growers and, as was done in this case, drawing a draft upon appellant with bill of sale attached thereto vesting title in appellant. A finding can not be overthrown on appeal unless to the appellate tribunal it is very plain that the conclusion reached can not be supported upon any rational view of the testimony. Such is not the case here.

[4] Appellant's next contention that the court's finding that cross-defendant John Montes was not the agent of respondents finds no support in the evidence, is without merit. The claimed existence of

any such agency, in so far as the sale and purchase of the lambs involved herein is concerned, is clearly negated by the testimony of respondents Izuel and Alonso. Neither is appellant aided by the contents of a contract introduced in evidence as defendant's Exhibit "A" because such agreement referred not to the lambs with which we are here concerned but to certain other livestock; such contract was not signed by respondents, and at the most simply serves to establish the fact that respondents knew of an arrangement by which certain other livestock was to be sold by them to cross-defendant Montes and one Batiz for which respondents were to be paid in cash; but with reference to the sale of the lambs, the evidence both oral and documentary is overwhelming that cross-defendant Montes was not authorized to act as agent for respondents. We are satisfied, as was the trial court, that the transaction regarding the sale of the other livestock was separate and distinct from the transaction concerning the lambs. Perusal by us of the Uniform Sales Act embraced in section 1738 et seq. of the Civil Code does not alter our conviction just stated. There is ample evidence to support the finding of the trial court that, by the terms of the contract as well as the usages of trade and the circumstances surrounding the instant transaction, it was the intention of the parties that the title to the lambs should pass in the manner and form asserted by respondents.

[5, 6] As the next ground of appeal it is urged by appellant that the court erred in finding that the acts of appellant constituted a conversion of the lambs. In support of this claim appellant asserts that respondents herein "freely and voluntarily parted with possession of their lambs with full knowledge that they were to be made available by the buyer for resale or slaughter"; and that therefore, the possession of the lambs by appellant was in all respects a lawful one from its very inception. But the aforesaid premise assumed by appellant is a fallacious one and contrary to the facts and the law. As we have heretofore pointed out, title to the lambs was to pass, according to the manifest intention of the parties, under the bill of sale which was attached to the draft drawn by defendant Stanford on appellant. Since the draft was not paid, title remained in

respondents. This transaction was a "cash sale" as distinguished from a sale on credit. But one conclusion can be drawn from the facts of this case and that is that the bill of sale was to be withheld from appellant by respondents and to accompany the draft drawn on the firm. Such being the clear intention of the parties, it follows as a matter of law that no title in the lambs could pass to appellant until by honoring the draft he had paid the "cash" for the livestock. It being the rule that upon a sale of goods for cash on delivery the title and right to possession remain in the vendor until the price is paid, the refusal of appellant to pay the draft resulted in his acquiring no title to the lambs which he could convey to Swift & Company or to any one else. *Hilmer v. Hills*, 138 Cal. 134, 139, 70 P. 1080; *Stefani v. So. Pac. Co.*, 119 Cal.App. 69, 73, 5 P.2d 946; *Wong Foo v. So. Pacific*, 41 Cal.App. 42, 44, 181 P. 823; *Giffen v. Selma Fruit Co.*, 5 Cal. App. 50, 53, 89 P. 855. Payment of the draft was the principal condition upon which title to the lambs depended. The action of appellant in exercising dominion and control over the property of respondents and making a sale thereof without such owners' consent amounted to a conversion. *Lusitanian-American Development Co. v. Seaboard Dairy Credit Corporation*, 1 Cal.2d 121, 129, 34 P.2d 139.

[7] Appellant's final contention that he having received the lambs from his principal, defendant Stanford, was bound to pay the proceeds of the sale to cross-defendant Montes in accordance with Stanford's instructions, falls because it is predicated upon the erroneous premise that the lambs were received by appellant from Stanford. There is substantial evidence in the record to support the statement that appellant received the lambs from respondent owners since the bill of sale was made direct to appellant and the livestock cleared through the customs authorities in appellant's name as consignee. As we have heretofore pointed out, defendant Stanford was not the agent of respondents. He was the agent of appellant in negotiating the sale and the latter was the purchaser of the lambs and the one who was to pay the consideration therefor.

For the reasons indicated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

**KLEIN v. MADDOX et al.**

Civ. 12405.

District Court of Appeal, First District,  
Division 1, California.

June 10, 1943.

Hearing Denied Aug. 5, 1943.

**1. Partition ☞69, 79**

Referee was properly appointed pursuant to stipulation of parties to take testimony and report on whether physical partition of realty was practicable, the value of realty without improvements, and the value of improvements exclusive of value of land. Code Civ.Proc. § 638, subd. 2.

**2. Appeal and error ☞198**

Failure to object to order appointing a referee in partition action precluded an attack on such order on appeal.

**3. Appeal and error ☞694(1)**

Where no objection was filed to referee's report and record did not contain proceedings had before referee, a bill of exceptions, or reporter's transcript to show proceedings had in court on hearing of motion to confirm referee's report, defendants could not urge on appeal that evidence was insufficient to support conclusions of referee and court.

**4. Appeal and error ☞220**

Where defendants in proceedings before referee and court made no objection to use of a plat drawn freehand instead of a survey, and it was not contended that plat was inaccurate or that feasibility of physical partition of land could not be determined therefrom, defendants could not complain on appeal from order confirming referee's report because referee had not obtained and attached to report such survey as directed by order of reference.

**5. Partition ☞85**

Where one cotenant has improved property and a sale is ordered in partition suit, the cotenant who constructed improvements is entitled to an allowance based on the then value of such improvements.

**6. Appeal and error ☞704(2)**

On appeal from order confirming referee's report in action to partition realty on which one of several tenants in common had constructed improvements, cotenants could not complain of referee's failure to find that improvements had not depreciated

value of land exclusive of improvements, in absence of showing that evidence of depreciation was introduced or that such finding would have been favorable to cotenants.

**7. Appeal and error ☞704(2)**

Where evidence is not set forth in record, appellate court will not consider an objection that trial court failed to find upon an issue, even if the issue is material.

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Appeal from Superior Court, Mariposa County; Andrew R. Schottky, Judge.

Action by Nonne Klein against Mary Duval Maddox and others for partition of certain real property, wherein defendants filed a cross-complaint asking that an accounting be had. From an order confirming referee's report that physical partition could not be had without injury to the interests of the parties, and directing referee to proceed with sale of the property, defendants appeal.

Order affirmed.

Girard N. Richardson, of Oakland, for appellants.

Chris. B. Fox, Robert R. York, and Ernest J. Livengood, all of Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action for partition of a parcel of real property in Mariposa County. The trial court made an order confirming the report of a referee that physical partition could not be had without injury to the interests of the parties, and directing the referee to proceed with a sale of the property. From that order defendants appeal. It is the position of defendants that the evidence is insufficient to support the finding that there cannot be a physical partition without prejudice to the parties, and that the order is insufficient because it fails to include a finding on an issue to which reference will hereafter be made. There is no merit in either contention.

Plaintiff owns a three-fourth undivided interest in the property. The defendants own designated portions of the remaining one-quarter. The property now contains 2.94 acres. Plaintiff has admittedly been in sole, exclusive and undisputed possession since 1926. Starting in that year plaintiff,



at her own cost and expense, improved the property by erecting thereon a main store building, cabins, garage, gas station, pumping plant and wells. Defendants at no time prior to this suit demanded an accounting, requested possession, or disputed plaintiff's right to proceed. They have contributed nothing towards the cost of the improvements. These facts all are admitted.

The complaint of plaintiff and the cross complaint of defendants both prayed for a physical partition, or, in the alternative, requested a sale if it should be found that physical partition could not be had without material injury to the rights of the parties.

In their answer and cross complaint defendants prayed that an accounting be had to determine the market value of the improvements and to ascertain the amount of the rents, issues and profits derived from the property. It was the then position of defendants that they had the right, if they elected, to contribute to the cost of the improvements and thereby secure a right to participate in the profits. They desired an accounting to determine if it would be to their advantage to share in the costs and profits. The first hearing was had on February 25, 1941, and at that time some evidence was taken and the question as to defendants' right to an accounting was fully argued before the trial court. The reporter's transcript filed on this appeal contains only the proceedings had on that date. On February 26, 1941, the court made its order that, under the circumstances, plaintiff was not required to account. No objection is made to this preliminary ruling.

On March 14, 1941, the court made an interlocutory decree in partition. The decree determined the respective interests of the parties, embodied the provisions of the order of February 26, 1941, and appointed a referee, who was directed to take testimony and report on three questions—whether physical partition was practicable, the value of the land without the improvements, and the value of the improvements exclusive of the value of the land. The decree recites that it was stipulated in open court that a single referee might be appointed to report on these three questions. The referee filed his report on May 14, 1941. He reported that: "The improvements \* \* \* are located on the property in such a manner that the common property cannot be physically subdivided in such a manner that the 15/20th portion allotted to

plaintiff will include the improvements placed upon said property by her, without interfering with the portion allotted to defendants in accordance with their respective interests as set forth in the interlocutory decree, therefore a partition could not be made in my opinion and do justice to the respective owners." He also found that the value of the property, exclusive of the improvements, was \$2,000, and that the improvements, exclusive of the property, were worth \$20,000. Plaintiff thereupon moved for an order confirming the referee's report and for an order directing the referee to sell. No objections were filed by defendants. The trial court, by order filed December 12, 1941, confirmed the report and directed the referee to sell. It is from this order that this appeal is taken.

[1,2] There can be no valid objection to the scope of the referee's powers as set forth in the order of March 14, 1941. The referee was appointed pursuant to stipulation of the parties. Under § 638, sub. 2, of the Code of Civil Procedure a reference may be ordered in such circumstances "to ascertain a fact necessary to enable the court to determine an action or proceeding." No objection was made to the reference. That precludes an attack on the order on the appeal. *Garland v. Smith*, 131 Cal. App. 517, 21 P.2d 688.

[3] The contention that the finding of the referee that physical partition is not feasible is unsupported by the evidence cannot be considered in view of the state of the record presented on this appeal. The reporter's transcript contains only the proceedings had on February 25, 1941. The proceedings had before the referee are not included in the record. Nor is there a bill of exceptions or reporter's transcript to show the proceedings had in court on the hearing of the motion to confirm the referee's report. The referee's report is included in the record. No objections were filed to this report. In the absence of objections filed (*Hoelt v. Hotchkiss*, 76 Cal.App. 670, 245 P. 458), or in the absence of a record showing the proceedings before the referee and court (*Rodehaver v. Mankel*, 16 Cal. App.2d 597, 61 P.2d 61; *First Nat. Bank v. Stansbury*, 118 Cal.App. 80, 5 P.2d 13; *Brodie v. Barnes*, 56 Cal.App.2d 315, 132 P.2d 595), defendants are precluded from urging insufficiency of the evidence to support the conclusions of the referee and court.

[4] Defendants complain that the referee did not obtain a formal survey of the premises as provided in the court's order of March 14, 1941, directing the reference. At the hearing of February 25, 1941, the parties and the court were agreed that a survey, which would show the land and the locations of the various buildings, was reasonably necessary, and the order of March 14, 1941, expressly so provided, and required the referee to attach such survey to his report. The referee's report refers to a "plat attached." This plat is apparently a freehand drawing of the land and improvements, rather than a strict survey, although it may be a tracing from a survey. It is apparently defendants' contention that a referee's report and decision of the court to the effect that physical partition is impracticable must, of necessity, be unsupported unless there has been a survey. It does not appear that the use of the plat was objected to in the proceedings before the referee or the court. It is not contended that the plat is not accurate or that it cannot be ascertained from it that physical partition is not feasible. For all that appears, the parties may have stipulated to use the plat rather than paying for an expensive survey. Defendants, under the authorities above cited, in the absence of a record, cannot now object that a plat instead of a survey was used.

[5-7] The only other point urged by defendants is that the court failed to find on a certain issue which it is contended was vital to the validity of the order appealed from. This point is based on the following theory: It is the law that where one cotenant has improved the property, and a sale is ordered in a partition suit, the cotenant who has constructed the improvements is entitled to an allowance based on the then value of such improvements. See annotation 1 A.L.R. p. 1189, where the cases are collected. In the present case the referee was directed to find the value of the improvements exclusive of the land, and the value of the land without the improvements. He found the value of the improvements to be \$20,000 and the value of the property to be \$2,000, and this report has been confirmed by the court. There can be no doubt that he was directed to find, and did find, present values rather than the original cost of the improvements. Present values admittedly constitute the proper basis for the allowance. Defendants urge that these improvements may have depreciated the value

of the real estate without the improvements, and that in the absence of a finding that there was no such depreciation the order appealed from cannot stand. Since there is no showing that evidence of such depreciation was introduced, defendants have made no showing that a finding on that issue, if made, would have been favorable to them. Hence, they are in no position to complain of the absence of such a finding. Moreover, where the evidence is not set forth in the record, an appellate court will not consider an objection that the trial court failed to find upon an issue, even if the issue be a material one. *Cavagnaro v. Delmas*, 29 Cal.App.2d 352, 84 P.2d 274; *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513; see cases collected 2 Cal.Jur. 525, § 262; 24 Cal.Jur. 945, § 189.

The order appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



59 Cal.App.2d 121

**PEOPLE v. JAMES.**

Cr. 3663.

District Court of Appeal, Second District,  
Division 3, California.

June 9, 1943.

#### 1. Criminal law ☞300

Where information charged defendant with having possession of Indian hemp on certain date, defendant's plea of not guilty put in issue such allegation. St.1939, p. 758, § 11160.

#### 2. Criminal law ☞335

##### Indictment and Information ☞176

In prosecution for having possession of Indian hemp, the people were not required to prove date of offense exactly as alleged, but burden was on people of showing that offense occurred within period of limitation. St.1939, p. 758, § 11160; Pen. Code, § 800.

#### 3. Criminal law ☞565

Where information filed on December 26, 1941, charged defendant with having possession of Indian hemp and officer's tes-

timony referred to December 12, but did not mention any year, and it appeared that preliminary examination was held on December 17, 1941, evidence was insufficient to show that offense was committed within statutory period of three years before filing of information. St.1939, p. 758, § 11160; Pen.Code §§ 800, 825, 859-862; Code Civ.Proc. § 1963, subds. 15, 33.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Fredis James was convicted of having Indian hemp in his possession, and he appeals.

Judgment reversed and cause remanded for a new trial.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

SHAW, Justice pro tem.

Defendant was convicted of a charge of violating section 11160 of the Health and Safety Code, St.1939, p. 758, by having Indian hemp in his possession. He appeals from the judgment.

[1,2] The principal point made on appeal is that the evidence is insufficient to show that the offense was committed within three years before the filing of the information, this being the statutory period of limitation for prosecutions for this offense. (Pen.Code, sec. 800.) This contention must be sustained. The information was filed December 26, 1941, and alleged that the offense charged was committed on December 13, 1941. The defendant's plea of not guilty put in issue this allegation of the information (*Rebstock v. Superior Court*, 1905, 146 Cal. 308, 311, 80 P. 65; *People v. Allen*, 1941, 47 Cal.App.2d 735, 748, 118 P.2d 927), and while the people were not required to prove the date exactly as alleged, the burden was on them of showing that the offense occurred within the period of limitation. See *People v. McGee*, 1934, 1 Cal.2d 611, 613, 36 P.2d 378; *People v. Allen*, 1941, 47 Cal.App.2d 735, 748, 118 P.2d 927; note, 13 A.L.R. 1446, and cases cited.

[3] We find but two references in the evidence to the date of the offense. Police Officer Moore testified that he arrested the

defendant (apparently for some other offense) "on the 12th of December" and that at Newton police station defendant pulled from his pocket a cigarette which was shown by the testimony of another witness to contain an unlawful amount of Indian hemp. This was the only possession of Indian hemp shown. Police Officer Yoakim testified that he had a conversation with defendant "on December 13th about 4:30 p.m. at Central jail" in which defendant admitted that "he had a marijuana cigarette on him \* \* \* the previous evening" when arrested. Neither of these officers mentioned any year, nor do we find anything in the record from which the year can be ascertained. The case was submitted to the trial court on the transcript of the evidence at the preliminary examination, and apparently that examination was conducted in a perfunctory manner, without much attention to the details of the proof necessary. There is a tendency toward the trial of certain types of cases by this method. If it is a desirable practice it should be followed only in cases where the transcript has been carefully examined and found to present all of the material facts.

Respondent calls our attention to the fact that the cigarette, when introduced in evidence at the trial, was contained in a large envelope bearing on the outside, in two places, apparently as dates, the figures "12-13-41." The cigarette had been placed in this envelope and sealed at the time it was taken from defendant. The police chemist who testified to the contents of the cigarette testified that he got it, in this envelope, from the property clerk at a different police station from that where it was placed in the envelope. Respondent asks us to determine from the dates on the envelope that the offense was committed in 1941. But no witness was produced to show when the envelope was delivered to the property clerk, who placed these dates on the envelope, when it was done, or what relation, if any, the dates bore to the time when the cigarette was taken from defendant. We cannot give the dates the effect claimed for them.

Respondent also cites the fact that the preliminary examination was held on December 17, 1941, refers to the statutory provisions requiring a defendant to be taken before a magistrate without unnecessary delay after his arrest (Pen.Code, secs. 825, 859), and the examination to commence within five days thereafter (Pen.Code, sec.



860), and the presumptions that official duty has been performed and that the law has been obeyed (Code Civ.Proc. sec. 1963, subds. 15 and 33), and argues that the offense, which was committed at the time of defendant's arrest, must have occurred within the time limit above stated before the preliminary examination. But a defendant can have this time limit extended. (Pen.Code secs. 861, 862.) It is also possible that he might escape from custody or abscond after being admitted to bail and thus the holding of the preliminary examination might be deferred indefinitely. There is nothing in the record to negative any of these possibilities.

We do not agree to appellant's contention that the cigarette whose contents were stated by the police chemist was not identified as that taken from defendant, but the identification can probably be improved at another trial, and discussion of the point at this time is unnecessary.

The judgment is reversed and the cause remanded for a new trial.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



59 Cal.App.2d 75

**BRUNVOLD v. VICTOR JOHNSON & CO.,  
Inc., et al.  
Civ. 12375.**

District Court of Appeal, First District,  
Division 2, California,  
June 7, 1943.

Rehearing Denied July 7, 1943.

Hearing Denied Aug. 5, 1943.

#### 1. Fraudulent conveyances ⚡299(1)

In action to subject corporate assets to judgment secured against individual who transferred his assets to corporation, evidence sustained finding that transfer was without consideration, in contemplation of insolvency, and to defraud plaintiff in enforcement of any judgment he might recover in then pending action. Civ.Code, §§ 3442, 3439.

#### 2. Fraudulent conveyances ⚡95(2)

Where corporation became wife's alter ego on transfer to her of husband's shares,

wife's alleged promise to make loan to corporation was not a "consideration" for transfer so as to relieve transaction of character of conveyance in fraud of husband's judgment creditor. Civ.Code, § 3439.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

#### 3. Husband and wife ⚡268(1)

Community property used in conduct of a business may be reached to satisfy judgment against husband based on breach of contract entered into in conduct of such business. Civ.Code, § 161a.

#### 4. Courts ⚡91(1)

District Court of Appeal is bound by departmental decision of Supreme Court which was later cited with approval by Supreme Court en banc.

#### 5. Constitutional law ⚡278(1)

##### Husband and wife ⚡247

The taking of community property to satisfy judgment against husband arising out of husband's operation of community business is not an unconstitutional deprivation of wife's vested interest therein since legislature in giving wife vested interest could properly impose condition that property should be liable for debts contracted by husband. Civ.Code, § 161a.

#### 6. Fraudulent conveyances ⚡226

Where community property was conveyed to corporation in fraud of husband's judgment creditor, property in hands of corporation remained "community property" as to creditor subject to satisfy judgment through whatever transmutations it might be traced.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

#### 7. Fraudulent conveyances ⚡226

Where community property is transferred to corporation in fraud of judgment creditor, equity can look through mask of corporate form to reach assets of community and can follow assets into whatever form they may be converted.

#### 8. Limitation of actions ⚡6(2)

Statute giving creditor, whose claim has matured right to attack fraudulent conveyance before judgment cannot relate back to date prior to effective date of statute and start three-year statute of limita-

tions running from date creditor's claim matured. Civ.Code § 3439.09; Code Civ. Proc. § 338, subd. 4.

#### 9. Limitation of actions ⇐60(5)

Action to set aside fraudulent conveyance commenced within three years of date of entry of judgment against transferor and within three years of effective date of statute authorizing creditor with matured claim to attack fraudulent conveyance before judgment was not barred by three-year statute of limitations. Civ.Code, § 3439.09; Code Civ.Proc. § 338, subd. 4.

#### 10. Creditors' suit ⇐4

Where judgment creditor claims that title of debtor's transferee is invalid, issue respecting title should be tried in appropriate action wherein judgment may be had and parties conclusively bound.

#### 11. Fraudulent conveyances ⇐241(4)

Judgment creditor may go into equity to set aside fraudulent conveyance without first resorting to statutory proceeding supplemental to execution when transferee of judgment debtor asserts title in himself. Code Civ.Proc. §§ 689, 714 et seq.; Civ. Code § 3439.09.

#### 12. Appeal and error ⇐1009(4)

In creditor's suit to subject property of corporation to satisfaction of judgment against individual who had transferred assets to corporation, testimony that sheriff who had returned execution unsatisfied, had made no bona fide search for debtor's property was insufficient to authorize reversal of judgment for creditor, since return of execution nulla bona was conclusive evidence that creditor's legal remedies were exhausted.

#### 13. Creditors' suit ⇐16

Under rule that where judgment debtor is shown to have no property subject to execution so that levy would be fruitless, return of execution nulla bona is not required as condition to suit to reach equitable assets of debtor, showing that sheriff made no bona fide search for debtor's property did not require reversal of judgment subjecting assets of corporation to which debtor had transferred his property to judgment against judgment debtor.

#### 14. Fraudulent conveyances ⇐299(1)

In suit by judgment creditor to subject assets of corporation to which debtor had transferred his property to creditor's

judgment evidence sustained finding and judgment for creditor.

#### 15. Fraudulent conveyances ⇐314

Where debtor, before entry of judgment, transferred assets to newly organized corporation and assets of corporation were subjected to payment of judgment in creditor's suit, deficiency judgment against directors who obtained no property from transaction except one share of stock and \$7.50 in dividends each was improper.

#### 16. Fraudulent conveyances ⇐179(1), 182(1)

No tort liability exists against those participating in fraudulent transfer where creditor at time of transfer has not reduced claim to judgment and holds no lien upon property conveyed.

#### 17. Executors and administrators ⇐453(2)

Where debtor, before entry of judgment, transferred assets to newly organized corporation and assets of corporation were subjected to payment of judgment in creditor's suit, entry of deficiency judgment against executrix of debtor was proper.

#### 18. Fraudulent conveyances ⇐314

Where debtor, before entry of judgment, transferred assets to newly organized corporation and assets of corporation were subjected to judgment in creditor's suit, entry of deficiency judgment against debtor's wife who received over \$36,000 from corporation in dividends was proper.

#### 19. Fraudulent conveyances ⇐182(1), 314

Where grantee of fraudulently conveyed property sells or converts it to his own use, he must account for value thereof to creditor and personal judgment may be entered against him for such amount.

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Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Louis A. Brunvold against Victor Johnson and Company, Inc., and others to subject assets of defendant corporation to the payment of a judgment obtained by plaintiff against defendant Victor Johnson. Judgment for plaintiff and defendants appeal.

Affirmed in part and reversed in part.

Thos. D. Aitken and Hone & Hone, all of San Francisco, for appellants.

Halverson & Halverson, of Los Angeles, for respondent.

DOOLING, Justice pro tem.

For a number of years before 1937 Victor Johnson was engaged in business under the name and style of Victor Johnson and Company. The business and its assets were the community property of Victor Johnson and his wife Hilda. In 1932 Victor Johnson in the conduct of such business entered into a contract with plaintiff giving plaintiff a five year exclusive agency in Southern California for the sale of certain commodities handled by Victor Johnson and Company. Victor Johnson breached this contract in 1935 and plaintiff commenced an action against him for damages for such breach. Plaintiff recovered judgment in that action for \$9,295.50 on September 29, 1937, and that judgment was subsequently affirmed in *Brunvold v. Johnson*, 36 Cal.App.2d 226, 97 P.2d 489.

After the trial of that action, but before judgment, Victor Johnson caused a corporation to be formed under the corporate name of Victor Johnson and Company, Inc. The incorporators were Johnson's wife, Hilda, his attorney, Thomas D. Aitken and his secretary, M. Smith. To this corporation Johnson and his wife transferred all of the assets of the business theretofore transacted under the name of Victor Johnson and Company in exchange for all of the capital stock of the corporation except two shares, one of which was issued to Aitken and the other to Miss Smith. One half of these shares was issued to each spouse, but Johnson immediately transferred to his wife the shares which had been issued to him.

After these transfers had been effected Johnson's only remaining asset standing in his own name was a summer home in the Santa Cruz mountains of a value of not more than \$3,000. The family home of the Johnsons in San Francisco stood of record in the name of Hilda A. Johnson, and on April 9, 1937 the Johnsons had recorded a declaration of homestead on this property, declaring it to be community property of the value of \$5,000.

Immediately after the transfer to the corporation of the assets of Victor Johnson and Company, Victor Johnson was elected president thereof and continued to manage and conduct the business in the same manner as before. On August 27, 1937, the corporation purchased an apartment house in San Francisco with its own funds. Before the damage action of *Brunvold v. Johnson* was affirmed on ap-

peal Victor Johnson conveyed to his brother-in-law the summer home in the Santa Cruz mountains.

After the affirmance of the judgment in the damage action, execution thereon was issued to the sheriffs of Los Angeles and San Francisco counties and both executions were returned nulla bona. Thereupon this action was commenced to subject the assets of Victor Johnson and Company, Inc., to the satisfaction of the judgment and for other appropriate relief. Pending this action Victor Johnson died and a claim based on the judgment was presented to his executrix by plaintiff and rejected. The inventory and appraisal in his estate showed the estate to consist of less than \$200 in cash and the family home, subject to a homestead, appraised at \$6,000 and listed as community property.

The trial court found that the corporation was organized with the intention and for the express purpose of taking over from Victor Johnson all of his assets not exempt from execution, that the transfer of assets from Victor Johnson to the corporation was without consideration and in contemplation of insolvency for the purpose of hindering, delaying and defrauding plaintiff in the enforcement of any judgment that he might recover in the action then pending against Victor Johnson and that by said transfer Johnson was divested of all assets save the summer home of a value of \$3,000. The judgment from which this appeal is prosecuted followed, by which it was decreed that the assets of the corporation including the shares of stock therein be sold to satisfy plaintiff's judgment and, that in case of a deficiency, judgment for such deficiency should be docketed against Hilda A. Johnson personally and as executrix of her husband's will, and against M. Smith and Thomas D. Aitken.

[1] The finding above summarized is attacked as not supported by the evidence but the evidence not only amply supports, but practically compels, the finding. It is undisputed that the assets transferred to the corporation had a net value in excess of \$50,000 and it is likewise undisputed that by the transfer Johnson was stripped of all assets subject to execution except the summer home valued at \$3,000. The witness Aitken, who was Johnson's attorney during all of the litigation, testified that before the transfer there would not have been a bit of trouble collecting on the judgment, but after the transfer he wrote to



plaintiff's attorney advising him that Johnson was without assets and offering to buy plaintiff's judgment for \$500 for its "nuisance value".

The transfer was not only void under § 3442, Civ.Code as it then read, but the court was fully justified in finding it void under § 3439, as being made with actual intent to hinder, delay, and defraud plaintiff in the satisfaction of his judgment. *Smedburg v. Bevilockway*, 14 Cal. App.2d 312, 58 P.2d 173; *Allee v. Shay*, 92 Cal.App. 749, 268 P. 962; *Tobias v. Adams*, 201 Cal. 689, 258 P. 588.

[2] There is some attempt to show a consideration given by Mrs. Johnson for the transfer to her of the shares of stock issued to her husband, in an alleged promise to lend the corporation \$10,000, if needed. Since the corporation, after the transfer, was to all intents and purposes her alter ego, as she owned all of its stock except two qualifying shares, this promise if made amounted to no more than one to lend \$10,000 to herself. How insubstantial is this claim is further shown by the undisputed evidence that she was paid a dividend of \$10,000 by the corporation on one day and the following day lent the corporation the same amount of money that she received from it the day before.

[3-5] Appellants ask us to reexamine the rule announced in *Grolemund v. Cafferata*, 17 Cal.2d 679, 111 P.2d 641, and to hold that community property acquired since the adoption of § 161a, Civ.Code is not liable for the satisfaction of debts contracted by the husband. This court is bound by that decision, which was cited with approval by the Supreme Court in *bank in Re Estate of Coffee*, 19 Cal.2d 248, 252, 120 P.2d 661. We may say in passing, however, that this case shows the wisdom of the rule announced by the Supreme Court in those cases. To hold that this property is not subject to this particular debt would be to arrive at the very unjust conclusion that community property used in the conduct of a business cannot be reached to satisfy a judgment based on the breach of a contract entered into in the conduct of that very business. The constitutional claim urged by appellants apparently did not impress the Supreme Court of the United States, which denied a writ of certiorari in *Grolemund v. Caferata*, 314 U.S. 612, 62 S.Ct. 87, 86 L.Ed. 492. The ready answer to the claim of unconstitu-

tional deprivation of property is that in giving a vested interest in community property to the wife the legislature could impose such condition that such property should be liable for debts contracted by the husband.

[6, 7] There is some claim that the present assets of the corporation, including the apartment house, cannot be reached in equity to satisfy the plaintiff's judgment, because they are not the property originally conveyed to the corporation. However the property conveyed was all community property, subject to execution to satisfy the judgment. It remained, as to the defrauded judgment creditor, community property subject to satisfy his judgment through whatever transmutations it may be traced. Equity can not only look through the mask of corporate form to reach the assets of the community, but it can follow those assets into whatever form of property they may, after the fraudulent conveyance, have been converted.

[8, 9] Appellants' claim that this action is barred by limitation upon examination proves to be without substance. It is based on the adoption of the Uniform Fraudulent Conveyance Act by our legislature in 1939, St.1939, p. 1667. By that statute § 3439.09 was added to the Civil Code, giving a creditor whose claim has matured the right to attack a fraudulent conveyance before judgment. This right so conferred could not relate back and start the statute of limitations running from the date that plaintiff's claim matured, as appellants seem to argue. Any new right conferred by § 3439.09 could only accrue on the date that that section became effective, i.e. September 19, 1939. Since this action was commenced within three years of the date of entry of the judgment sued upon and also within three years of the effective date of § 3439.09 Civ.Code, it is clearly not barred under § 338, subd. 4, Code Civ.Proc.

[10, 11] Appellants' argument that plaintiff was not entitled to go into equity without first proceeding under §§ 714 et seq. and 689 Code Civ.Proc. is fully answered by *Bond v. Bulgheroni*, 215 Cal. 7, 8 P.2d 130, and the cases therein cited. Here the corporation and Hilda A. Johnson were asserting ownership of the property sought to be reached under a legal title which could only be attacked in equity. As said in *Bond v. Bulgheroni*, supra, 215 Cal.

at page 10, 8 P.2d at page 135: "Where a judgment creditor claims that title under a conveyance or transfer is invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action in which a judgment may be had and the parties conclusively bound." We may also point to § 3439.09, already referred to in discussing the statute of limitations. That section expressly gives the creditor as to whom a conveyance is fraudulent the alternative rights, either to

"(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

"(2) Disregard the conveyance and attach or levy execution upon the property conveyed." Cf. *In re Estate of Kalt*, 16 Cal.2d 807, 810, 108 P.2d 401, 133 A.L.R. 1424.

[12, 13] Execution was issued and returned wholly unsatisfied. Appellants sought to impeach the return of the San Francisco sheriff by showing that no bona fide search was made for property of the debtor, and now claim that such testimony is ground for reversal. There are at least two valid answers to this contention. 1. It is the law of this state that the return of execution nulla bona is conclusive evidence that the creditor's legal remedies have been exhausted. 7 Cal.Jur. pp. 792, 793; *Baines v. Babcock*, 95 Cal. 581, 591, 27 P. 674, 30 P. 776, 29 Am.St.Rep. 158. 2. Where, as here, the judgment debtor is shown to have no property subject to execution, so that a levy would be fruitless, the return of execution nulla bona is not required as a condition to a suit in equity to reach equitable assets of the debtor. 12 Cal.Jur. pp. 1038, 1039; *Keeley v. Anderson*, 14 Cal.App.2d 467, 58 P.2d 410; *Bird v. Murphy*, 72 Cal.App. 39, 44, 236 P. 154.

[14] Some claim is made of the bias and prejudice of the trial judge. An examination of the record satisfies us that the case was fairly tried, and that on the evidence the trial judge could not reasonably have arrived at any other conclusion than the one found, that the transaction attacked was fraudulent as to plaintiff.

[15, 16] It remains only to consider the deficiency judgment against the appellants. There is no evidence that M. Smith or Thomas D. Aitken obtained any property from the transaction except one share of stock and dividends amounting to \$7.50 each. As to M. Smith it may be added parenthetically that a reading of the entire record shows no evidence that she was guilty, or even had knowledge, of any fraud. Since no property, except the trifling amount above stated, came into the hands of either of these defendants the judgment against them must be based on the theory of damages for tort. It is settled, however, that no tort liability exists against those participating in a fraudulent transfer, at least where the creditor at the time of the transfer has not reduced his claim to judgment and holds no lien upon the property conveyed. *Glenn on Fraudulent Conveyances and Preferences*, Rev. Ed., Vol. 1, p. 123 and cases cited in note 72; *Moore on Fraudulent Conveyances*, Vol. 2, pp. 756, 757.

[17-19] The deficiency judgment against Hilda A. Johnson as executrix is clearly proper since the judgment sued upon is the primary obligation of her decedent. The deficiency judgment against Mrs. Johnson personally is likewise proper. She received over \$36,000 from the corporation in dividends and by her own testimony invested at least \$20,000 of this amount in an annuity payable to herself. "When property alleged to have been fraudulently conveyed to the defendant is shown to have been sold by the grantee, or converted to his own use, the court will direct the defendant to account for the value thereof to the creditors and will enter a personal judgment against the grantee for the amount." 12 Cal.Jur. p. 1043; 27 C.J. pp. 668, 855, 856.

That portion of the judgment providing for the docketing of a deficiency judgment against M. Smith and Thomas D. Aitken is reversed and in all other particulars the judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

**CRITTENDEN v. HANSEN et al.**

**Civ. 12426.**

**District Court of Appeal, First District,  
Division 2, California.**

**June 3, 1943.**

**1. Specific performance ☞121(3)**

In vendee's suit for specific performance of contract to convey land, evidence sustained finding that plaintiff did not perform conditions of contract, that vendor granted plaintiff no extension of time, and that subsequent vendees purchased the land for valuable consideration.

**2. Appeal and error ☞1009(1)**

In equity suit, that trial court might have found differently on the facts does not require a reversal.

**3. Vendor and purchaser ☞185**

Where vendee is in default there is no longer any legal obligation on vendor to proceed with performance of contract, and vendor may regard contract as ended, and the law prescribes no penalty for vendor's exercise of this right.

**4. Specific performance ☞121(3)**

In vendee's suit for specific performance of contract to convey land, where vendor's good faith in making subsequent sale to other vendees was not questioned, fact that vendor was a tradesman, and vendee, who prepared contract, was a lawyer, and that vendee paid nothing at time contract was executed were entitled to be given full weight by chancellor, in determining equities of the proceeding.

**5. Vendor and purchaser ☞220**

Where subsequent vendees of land had no notice or knowledge of prior contract to convey land to another, subsequent vendees, on purchasing the land for valuable consideration, acquired absolute title to land.

**6. Vendor and purchaser ☞244**

In vendee's suit for specific performance of contract to convey land, direct denial, by agent of subsequent vendees of the land, of agent's knowledge of contract on which suit was based sustained finding that subsequent vendees had no notice or knowledge of the contract.

**7. Specific performance ☞65**

Where subsequent vendees of land had no notice or knowledge of prior contract to convey land, prior vendee's remedy against vendor was not by suit for specific performance but by action against vendor for damages for breach of contract.

**8. Election of remedies ☞5**

Where the remedies by suit in equity for specific performance and by action in tort for breach of contract, both exist, vendee in contract for conveyance of land must elect between the remedies and may not pursue both remedies.

**9. Specific performance ☞128(4)**

Where vendee in contract to convey land did not plead cause of action for damages for breach of the contract and subsequent vendees had purchased the land for valuable consideration, vendee was entitled neither to specific performance nor to damages for the breach.

**10. Specific performance ☞13, 16**

Specific performance of a contract will not be required where enforcement of the contract would be impossible or inequitable. Civ.Code, § 3390, subd. 4.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Suit by Howard B. Crittenden, Jr., against Arthur B. Hansen and others for specific performance of a contract to convey land, and for damages. Judgment for defendants, and plaintiff appeals.

Affirmed.

Forrest E. Macomber, of Stockton, for appellant.

Jones & Quinn, of Stockton, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for specific performance of a contract to convey land, and for damages. He appeals from the judgment which denied him any relief.

On December 9, 1939, defendant Hansen and plaintiff entered into a written agreement whereby the former agreed to sell to plaintiff a house and lot, and the furniture therein, for the sum of \$1100. Though time was not specifically made the essence of the agreement, the purchase price and the deed.



were required to be put in escrow which was to be "ready to be closed by noon December 18, 1939." A condition of the same was that Hansen was to move a fence, which was about seventeen inches off the property line. At noon of December 18th Hansen learned that plaintiff had deposited no money, and he thereupon sold the property to defendant Knudsen.

The trial court found that plaintiff did not perform the conditions of the contract, that defendant Hansen did not grant any extension of time to the plaintiff, and that the defendants Louis and Josephine Knudsen did not have any knowledge, actual or constructive, of plaintiff's contract, and purchased the property for a valuable consideration.

[1-3] There is substantial evidence supporting each of these findings. Appellant's argument in this regard amounts to no more than that the trial court might have found differently. This may be conceded, but it does not call for a reversal. Evidence was offered showing that appellant informed Hansen that he could not raise the money, that he had a number of business engagements which would take him to other parts of the state at the time payment was to be made, and would be unable to meet Hansen on December 18th and asked for an extension of the time for payment which was refused. The witness Hansen testified that on frequent occasions appellant told him he did not have the money, but that he would get it; that he, appellant, "could sit back and freeze me out, get it at his own price." Because of these circumstances the vendor was led by the vendee to believe that the latter would not complete the purchase, that he was holding the written contract merely to harass the vendor and "freeze" him out so that he could get the property at his own price. "Where the vendee is in default, there is no longer any legal obligation on the vendor to proceed with the performance of the contract. The law gives him the right to regard the contract as at an end. The law prescribes no penalty for the exercise of this right." *Dunne v. Colomb*, 192 Cal. 740, 745, 221 P. 912, 913.

[4] However, it is not necessary to determine whether the trial court correctly determined that the vendee here was in default. The vendor was a tradesman and was dealing with a member of the legal profession, who prepared the contract. It

is apparent from an examination of the entire record that the vendor believed he was giving his vendee only an option to purchase which would extend to 12 o'clock noon of December 18th, and no longer, and that no legal steps were necessary to terminate the contract at that hour. The vendee paid nothing for this "option." The good faith of the vendor in making the sale to his codefendants is not questioned, and these circumstances were entitled to full weight by the chancellor in reaching a determination of the equities of the proceeding.

[5,6] In view of the findings of want of notice or knowledge on the part of the Knudsens their title became absolute, and specific performance of the contract was thereby rendered impossible. The complaint pleaded that on December 18, 1939, defendant Hansen "sold and conveyed all of his right, title and interest in and to said property" unto defendants Knudsen and wife. This allegation was found to be true, and, though some testimony was offered tending to show constructive knowledge on the part of Louis Knudsen, none whatever was offered in relation to Mrs. Knudsen. Though some testimony was offered tending to show that the trust officer had been informed that respondent Knudsen had some notice of the prior transaction it proved little more than that he knew that Hansen had given some kind of an option to appellant which had expired. His direct denial of knowledge of the contract, assuming that he was the agent of the Knudsens, was sufficient to support the finding of the trial court.

[7-10] Under these circumstances appellant's remedy was by suit in damages against Hansen for breach of contract. But, where the two remedies exist, the party must make his election between a suit in equity for specific performance, and a suit in tort for the breach. He cannot pursue both. *Beal v. United Properties Co.*, 46 Cal.App. 287, 296, 189 P. 346. Now if appellant had a cause of action for damages for breach of the contract he did not plead it. His allegations of the reasonable rental value of the property all relate to his claim of right to possession under the contract, if it should be enforced. But since the contract has become unenforceable, appellant is confronted with the settled rule that specific performance will not be required when its enforcement would be impossible or

inequitable. 23 Cal.Jur. p. 423; Restatement of the Law of Contracts, Section 368; Tropico Land, etc., Co. v. Lambourn, 170 Cal. 33, 39, 148 P. 206; Title Guarantee, etc., Co. v. Henry, 208 Cal. 185, 192, 280 P. 959; Section 3390, subd. 4, Civil Code.

The judgment is affirmed.

SPENCE, J., and DOOLING J., pro tem., concur.



59 Cal.App.2d 39

**YOSEMITE PORTLAND CEMENT CORPORATION v. STATE BOARD OF EQUALIZATION OF CALIFORNIA et al.**

Civ. 12350.

District Court of Appeal, First District,  
Division 1, California.

June 2, 1943.

Hearing Denied July 29, 1943.

**1. Contracts** ⇨13

Under general contract law, it is of essence of "contract" that there be two contracting parties of separate identity.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

**2. Statutes** ⇨179

The Legislature may properly describe as a "contract", within meaning of particular statute, a transaction which lacks one or more of characteristics of contract as generally defined.

**3. Licenses** ⇨19(3)

The word "contract", as used in section of Retail Sales Tax Act exempting from provisions thereof gross receipts from sales of tangible personalty used for performance of public works contracts executed before effective date of such act, includes construction contract awarded by city to a department thereof, though such an agreement is not a "contract" within general meaning of term. St.1933, p. 2601, § 5(d); Civ.Code, §§ 1549, 1550.

**4. Municipal corporations** ⇨328

The provision of San Francisco city and county charter, approved by Legisla-

ture, for filing of bids by, and award of public works construction contracts to, city and county departments, must be construed, and has same force and effect, as law directly enacted by Legislature. St.1931, p. 3048, § 95.

**5. Licenses** ⇨19(3)

The statutory exemption from retail sales taxes of gross receipts from sales of tangible personalty, used for performance of public works contracts executed before effective date of act imposing such taxes, should be given normal reasonable construction, rather than strict construction against taxpayer, though exemption is not directly applicable to municipalities. St. 1933, p. 2601, § 5(d).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Proceeding by the Yosemite Portland Cement Corporation against the State Board of Equalization and others for a writ of mandate compelling the board to approve petitioner's claim for refund of retail sales taxes paid by it. Judgment granting a peremptory writ, and respondents appeal.

Affirmed.

Robert W. Kenny, Atty. Gen. of Cal., H. H. Linney, Asst. Atty. Gen. of Cal., and Adrian A. Kragen, Deputy Atty. Gen. of Cal., for appellants.

Earl & Hall & Gerdes, of San Francisco, John J. O'Toole, City Atty. of City and County of San Francisco, Dion R. Holm, Asst. City Atty. of City and County of San Francisco, and Nora A. Blichfeldt, Deputy City Atty. of City and County of San Francisco, all of San Francisco, for respondent.

PETERS, Presiding Justice.

The Yosemite Portland Cement Corporation brought this proceeding for the purpose of compelling the State Board of Equalization to approve its claim for a refund of retail sales taxes paid by it under protest.

After overruling the demurrer of respondents, the trial court, by peremptory writ of mandate, ordered the Board to refund or to credit the petitioner with the sum of \$2,017.07 found to have been illegally collected from it. The Board, its mem-

bers, and the other state officers and agencies named in the petition, appeal.

The taxes involved were assessed against the Yosemite company based upon its gross receipts from sales of cement to a department of the City and County of San Francisco known as the Hetch Hetchy Project. This cement was sold to the Hetch Hetchy Project under the following circumstances: On May 3, 1932, the electorate of San Francisco approved a bond issue in the sum of \$6,500,000 to complete the Hetch Hetchy water project. One part of the work contemplated was the construction of the Coast Range tunnel. The city submitted that construction work to competitive bidding. Several private contractors and the Hetch Hetchy Project submitted bids. Under § 95 of the charter of the City and County of San Francisco departments of the city are allowed to bid on such projects. Bids were opened in June of 1932 and the Hetch Hetchy Project was the lowest bidder. In August of 1932 the contract for the construction of the tunnel was awarded the Hetch Hetchy Project. Sometime after August 1, 1933, certain quantities of cement were sold by the Yosemite company to the Hetch Hetchy Project for use in the performance of the contract awarded the Project. The gross receipts from these sales were taxed by the Board, were paid by the company under protest, and after a claim for refund had been denied, this petition was filed.

The controversy as to whether these sales were subject to the act turns upon the correct interpretation of § 5 of the Retail Sales Tax Act of 1933 which became effective on August 1st of that year, Stats. of 1933, Chap. 1020, pp. 2599, 2560. So far as pertinent here, § 5 reads as follows:

"There are hereby specifically exempted from the provisions of this act \* \* \* the following: \* \* \*

"(d) The gross receipts from sales of tangible personal property used for the performance of a contract on public works executed prior to the effective date of this act."

[1-3] Both litigants concede that the fact that the sales of cement by the Yosemite company to the Hetch Hetchy Project occurred subsequent to the effective date of the statute is immaterial if there was a "contract on public works executed prior" to that date. The Board contends that the transaction by which the city awarded the

construction of the tunnel to the Hetch Hetchy Project and by which the Project agreed to perform that work, was not a "contract" within the meaning of § 5(d), supra. The Board contends that the Hetch Hetchy Project is simply a department of the city government; that where a department enters into an arrangement to do city work for the city it is simply a case of the city contracting with itself; that to constitute a "contract" there must be two parties of separate identity, and there must be a remedy to enforce the obligations; that in the instant case the arrangement was not a "contract" within the general definitions found in the Civil Code, §§ 1549, 1550. This argument presupposes that the legislature, in using the phrase "contract on public works" used the term "contract" to mean a transaction of the type complying with the general code sections on that subject. There can be no doubt that the Hetch Hetchy Project is not a separate corporate entity. There can also be no doubt that under general contract law it is of the essence of a contract that there be two contracting parties of separate identity. For that reason the transaction between the Project and the city was not a contract within the general meaning of that term. But that conclusion is not determinative of the issue here presented. The very question here involved is the sense in which that term was used in § 5(d). The legislature may properly describe as a "contract" within the meaning of a particular statute a transaction which lacks one or more of the characteristics of a contract as generally defined. It is our opinion that the legislature must have intended that the word "contract" as used in § 5(d) should include agreements of the type here involved between a department and the city.

[4] The City and County of San Francisco adopted a new charter which was approved by the legislature in 1931. Stats. of 1931, pp. 2973, 2978. Section 122 (Stats. of 1931, at p. 3048) of that charter as thus approved provides that the municipal railway, the water department and "the Hetch Hetchy project until the completion thereof when it shall be merged with the water department \* \* \* shall each be designated as a department under the [Public Utilities] commission \* \* \*." Section 95 of the charter, Stats. of 1931, at p. 3035, is the section that deals specifically with the award of contracts on public works.



The section is headed "Contracts. Public Works and Purchasing Contracts." It requires that the construction of public works costing over \$1,000 "shall be done by contract," and shall be let to the lowest responsible bidder. It then expressly provides that: "The board of supervisors, by ordinance, shall establish procedure whereby appropriate city and county departments may file sealed bids for the execution of any work to be performed under contract. If such bid is the lowest, the contract shall be awarded to the department. Accurate unit costs shall be kept of all direct and indirect charges incurred by the department under any such contract, which unit costs shall be reported to and audited by the controller monthly and on the completion of the work." This charter provision, being part of a charter approved by the legislature, must be "construed as a law enacted by the Legislature." *Bruce v. Civil Service Board*, 6 Cal.App.2d 633, 636, 45 P.2d 419, 421. Such approved charter is a law of the state, and has the same force and effect as a law directly enacted by the legislature. *C. J. Kubach Co. v. McGuire*, 199 Cal. 215, 248 P. 676; *Stern v. City Council of Berkeley*, 25 Cal. App. 685, 145 P. 167; *Taylor v. Cole*, 201 Cal. 327, 257 P. 40; *Whitmore v. Brown*, 207 Cal. 473, 279 P. 447. We must presume that the 1933 legislature in adopting § 5(d) knew what the 1931 legislature had done in approving § 95 of the San Francisco charter.

Acting pursuant to the power conferred by § 95, *supra*, the city adopted a Contract Procedure Ordinance making detailed provision for the manner of awarding public contracts. Section 7 of that ordinance provides that "departments may file sealed bids for the execution of any work to be performed under a contract"; that bids of a department must be approved by the Controller; that "if the bid of a city and county department, as investigated and approved by the Controller, is the lowest, the contract shall be awarded to the department and accurate unit costs shall be kept of all direct and indirect charges incurred by the department under any such contract \* \* \*." Section 9 of the same act requires the Controller to keep records of the total direct and indirect costs of work done by departments, and confers upon him the power to "refuse to approve contracts with a department shown to be re-

peatedly underbidding on contract work and failing to complete same within the contract price."

It was under these charter and ordinance provisions that the "contract" to construct the tunnel was awarded to the Hetch Hetchy Project. Four private contractors, as well as the Project, submitted bids. That of the Project was substantially lower than those submitted by the private contractors. It is obvious, and the Board admits, that if one of the private contractors had been awarded the contract the sales of cement by the Yosemite company to such a contractor would have been exempt from the tax.

It will be noted that the charter and the ordinance repeatedly refer to the awarding of a bid to a department as a "contract." Thus the legislature of 1931 in approving the charter used the term "contract" to include arrangements between a department and a city. When the legislature of 1933 adopted the sales tax act, and particularly § 5(d) exempting gross receipts on sales of property "used for the performance of a contract on public works" it is a reasonable inference that they meant to include the type of arrangement designated as a "contract" by the prior legislature. Both the charter provisions and § 5(d) of the taxing statute relate specifically to public works. For that reason the term "contract" should be interpreted, if possible, to mean the same thing in both statutes.

This construction is fortified by the fact that one of the obvious purposes of § 5(d) was to protect contractors who had entered into contracts for the construction of public works prior to the effective date of § 5(d) from having their costs increased by the amount of the new tax when their bids were figured without reference to such taxes. This was the view taken of the purpose of the statute by the Attorney General in June of 1939 when he was called upon to rule upon the taxability of certain sales to contractors working on the Golden Gate Bridge. In that opinion (N.S. 1788) it is stated: "The foregoing exemption was adopted by the Legislature with full knowledge of the fact that construction work had started on the bridge project and that bids had been made and accepted for the construction work. It was realized that the economic effect of the act on contractors would be serious and possibly

disastrous and therefore the Legislature was moved to adopt the exemption in order to avoid harsh and unjust results. No discrimination, it may be assumed, was intended as between contractors on this project. The intent apparently was to protect all who were no longer free to protect themselves; that is to say, those who had already executed their formal contracts as well as those who had, by the acceptance of their bids, become bound to performance." The same economic argument applies with even greater force where a city and county itself is doing the work through a department. The bid of such department, accepted prior to the passage of a sales tax, just as would be the case of a contractor's bid, would be made without reference to prospective sales taxes. To exclude departmental bids from the operation of § 5(d) would be to place an additional burden on the public revenues of the city by the imposition of sales taxes not in contemplation when the bid was submitted and approved. Certainly it was never the purpose of the statute to protect retailers in their dealings with private contractors but to leave them defenseless when dealing with a governmental agency. Particularly is this argument applicable to public works being performed by a department pursuant to a bond issue. In determining whether the work shall be done the city must keep the costs within the limits of the bond issue. If the costs to the city were to be increased by reason of the subsequent imposition of the sales tax on retailers it might result in such costs exceeding the amount authorized by the bond issue. All these factors must have been in the mind of the legislature when section 5(d) was adopted. It is true that in a prior opinion of the Attorney General, dated February 1, 1935, addressed to the State Board of Equalization, the Attorney General ruled that the very transactions here involved were subject to the tax, giving as his reason the belief that the awarding of a bid to a department did not create a contract within the meaning of § 5(d). But this opinion did not discuss the arguments contained in the subsequent opinion.

The Board points to a statement appearing in *Roth Drug, Inc., v. Johnson*, 13 Cal. App.2d 720, 739, 57 P.2d 1022, 1031, that the exemption contained in § 5(d) "was provided to prevent the act from having the effect of violating the obligations of contracts." This reason would not be applicable to a "contract" between a department and the city, because such a transaction is not within the impairment of obligations of contract clause. The statement in the Roth case did not purport to declare that the reason given was the sole reason for passing the provision. The economic reason above given might very well have been a factor as well as the legal factor mentioned in the Roth case.

[5] The Board contends that any ambiguity in § 5(d) must be construed against the Yosemite company under the rule that tax exemptions must be strictly construed against the taxpayer. *Bay Cities Transp. Co. v. Johnson*, 8 Cal.2d 706, 68 P.2d 610; *Miller v. McColgan*, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424. The Yosemite company contends that that rule has no application to tax exemptions applicable to municipalities. *Pasadena v. County of Los Angeles*, 182 Cal. 171, 187 P. 418. The percent exemption is not directly applicable to municipalities. The sales tax is imposed on retailers and the exemption is in favor of retailers selling to a governmental agency. Obviously, however, if the Yosemite company has to pay this tax it will be passed on in similar transactions to the governmental agency. Under such circumstances we think the exemption, which is expressly limited to contracts "on public works," should be given a normal reasonable construction rather than a strict construction against the taxpayer. So construed we think, for the reasons given, the words "contract on public works" in § 5(d) must be construed to mean the same thing as is meant by similar terms in the charter of San Francisco. For that reason the transactions here involved are exempt.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

**HERBERT'S LAUREL-VENTURA, Inc., v.  
LAUREL VENTURA HOLDING COR-  
PORATION.**

**LAUREL VENTURA HOLDING CORPORA-  
TION v. HERBERT'S LAUREL-  
VENTURA, Inc.**

Civ. 13956, 13957.

District Court of Appeal, Second District,  
Division 2, California.

May 21, 1943.

Hearing Denied July 19, 1943.

**I. Evidence ☞21**

**Landlord and tenant ☞37**

In determining rights of parties to lease of drive-in cafe, trial court could consider, not only phraseology of lease, but also absence of provisions which would have defeated uncertainty, and could take judicial notice of universally prevalent customs.

**2. Appeal and error ☞931(1)**

On appeal from a judgment, the findings should be so construed as to support the judgment if such construction can be reasonably ascribed to the findings.

**3. Appeal and error ☞1008(3)**

Where construction given an instrument such as a lease by a trial court is reasonable and consistent with the true intent of the parties, District Court of Appeal will not substitute another interpretation though such other interpretation seems equally tenable. Civ. Code, § 1641.

**4. Appeal and error ☞1008(3)**

Construction of ambiguous contract, such as a lease, is first presented to trial judge, whose determination will not be disturbed on appeal unless determination is unreasonable and unjustified. Civ. Code, § 1641.

**5. Appeal and error ☞931(1)**

Where, in action for declaratory judgment fixing rights of parties to lease of drive-in cafe, evidence in addition to the lease itself was received at the trial and was not contrary to construction placed by trial court on lease, District Court of Appeal would indulge all reasonable inferences in support of trial court's finding.

**6. Appeal and error ☞931(1), 1010(1)**

On appeal from judgment on ground of insufficiency of the evidence, all conflicts

must be resolved in favor of the judgment and all reasonable inferences must be drawn in support of judgment, and, if there is any substantial evidence to support judgment, reversal is not justified.

**7. Landlord and tenant ☞200(1)**

Where lease of premises as drive-in cafe provided for payment of percentage of tenant's gross receipts as rent, and sums received by tenant from concessionaire who had installed cigarette vending devices were only income paid to tenant on account of the devices, and cigarettes, while in devices, remained concessionaire's property, sale of cigarettes by such devices was not such a "sale of merchandise" that tenant, in computing rent, was required to include in "gross receipts" all money deposited in the devices.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Receipts" and "Sale of Merchandise".

**8. Landlord and tenant ☞200(1)**

Where premises operated by tenant as drive-in cafe provided for payment of percentage of tenant's gross receipts as rent, and juke boxes were installed in cafe by concessionaire, playing music from records which remained concessionaire's property, the music was not such a "service" performed by tenant or tenant's employee that tenant, in computing rent, was required to include in "gross receipts" all money deposited in boxes, though tenant's gains from the boxes were "revenues".

See Words and Phrases, Permanent Edition, for all other definitions of "Revenues" and "Service".

**9. Landlord and tenant ☞200(1)**

Where lease of premises operated by tenant as drive-in cafe provided for payment of percentage of tenant's gross receipts as rent, entering as "receipts" the sums received as rental from the public service corporation to which public telephone installed in cafe belonged was a reasonable compliance with the lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Receipts".

**10. Landlord and tenant ☞76(2)**

Installation on premises operated by tenant as a drive-in cafe of a public tele-



phone did not violate inhibition in lease against "subletting" of premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Subletting".

#### 11. Landlord and tenant — 200(1)

Where lease of premises operated as drive-in cafe provided for payment of percentage of tenant's "gross receipts" as rent, but authorized tenant to deduct from such receipts all meals served to tenant's employees, tenant was not required to add such prices to such receipts in computing rent.

#### 12. Landlord and tenant — 200(1)

Where lease of premises operated as drive-in cafe provided for payment of percentage of tenant's gross receipts as rent, and tenant allowed tenant's car hops to retain all tips received by car hops from patrons, in discharge of tenant's obligation to pay minimum weekly wage to car hops, and tenant posted in cafe statutory notice that tips given to car hops were retained by car hops as part compensation, tenant was not obliged to include such tips among "gross receipts" in computing rent. St. 1937, p. 203, § 351.

A "tip" is a gratuity, a free gift, a present not intended for the proprietor of a restaurant, but intended by the donor to be in excess of the compensation paid to the donee by the donee's employer, or a gift where there is neither a consideration therefor nor a legal obligation upon the donor to part therewith.

See Words and Phrases, Permanent Edition, for all other definitions of "Tip".

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Actions by Herbert's Laurel-Ventura, Incorporated, against Laurel Ventura Holding Corporation for a declaratory judgment, and by Laurel Ventura Holding Corporation against Herbert's Laurel-Ventura, Incorporated, for an accounting. Judgments for Herbert's Laurel-Ventura, Incorporated, and Laurel Ventura Holding Corporation appeals.

Affirmed.

Frank H. Love and A. L. Abrahams, both of Los Angeles, for plaintiff and respondent.

Zagon, Aaron and Fink, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

The question for decision in this case is whether the lessee of a drive-in cafe who allows its car hops to retain all tips received from the patrons in discharge of its obligation to pay a minimum weekly wage to such car hops is obliged under its lease to include among its gross receipts such tips so received; also whether it should include in such gross receipts a total of moneys expended by the patrons in the public telephone, in cigarette-vending machines, and in music boxes installed in such cafe.

On December 12, 1939, appellant leased to respondent's predecessor a certain lot situated on Ventura Boulevard in the suburbs of the city of Los Angeles. Subsequently with appellant's consent, respondent acquired the lease by assignment and assumed its obligations. By the terms of that writing the leasehold was to be used solely and exclusively for conducting a drive-in cafe, or cocktail room, hereafter referred to as the "Drive-In."

That part of the lease which precipitated the controversy now before us is as follows:

"During the term hereof, Lessee shall pay to Lessor a minimum yearly rental of Six Thousand Dollars (\$6,000.00) payable in monthly installments of Five Hundred Dollars (\$500.00) each, or shall pay to Lessor a sum equal to six per cent (6%) of the yearly gross receipts of the business done by it on the demised premises, whichever sum shall be the greater.

"The term 'gross receipts' shall include all money and other things of value received by or paid to the Lessee or to others for the Lessee's use and benefit, and all credit extended by the Lessee in connection with the business conducted by it on said premises, including (but without in anywise limiting the foregoing) the sale of all merchandise of whatsoever kind and character and all services performed by the Lessee or anyone working for the Lessee for which any such compensation is received; provided, however, that in the computation of said gross receipts there shall first be deducted all direct taxes on the service or merchandise sold which are passed on to and paid by the consumers thereof or by Lessee as a tax (such as sales tax) and meals to employees and owners."

After the commencement of such business, respondent permitted cigarette-vending machines, music boxes, and a public telephone to be installed on the premises,

for each of which a consideration was paid monthly for the privilege granted to the several concessionaires. Thereafter, basing its claim upon the covenants above quoted, defendant demanded payment of moneys in addition to those theretofore received in payment of rentals. Thus a dispute arose between the parties as to whether such moneys deposited in such devices constituted a part of the gross receipts of the respondent's business, or whether the gross receipts as contended by respondent should include only the moneys actually paid for the license to install the automatic appliances within the cafe.

During the same period and prior to the institution of any action, respondent kept in its service in connection with the Drive-In certain waiters and waitresses known as "car hops" on the following basis: That respondent should furnish their meals and in addition thereto the latter should retain all tips or gratuities left with them by patrons of respondent, provided, however, that if any car hop should receive in tips less than \$16.75 for each week of 48 hours the difference should be paid to the car hop by respondent.

Appellant having declared to respondent that under the terms of the lease respondent was obligated under the quoted passage of the lease to pay 6 per cent of the gross sums paid into the public telephone and mechanical devices as well as of the gratuities received by the car hops, respondent on October 3, 1941, filed its action for declaratory relief whereby it demanded a judgment fixing the legal rights of the parties concerning the controversy existing between them and that the court determine the proper construction to be given to the quoted clauses and to fix the legal rights and obligations of the parties.

Thereafter on December 29, 1941, appellant filed its action for an accounting in which it set forth the same contentions which it had made to respondent and demanded that respondent be "ordered to account to plaintiff for 6 per cent of the gross business done by it from the premises governed by the lease as the term gross receipts is defined therein."

Appropriate answers were filed in both actions. Both cases were tried at the same time and all the evidence received was made applicable to each cause. Two sets of findings were signed and filed on the same day and the two consequent judgments were entered on the same day, rejecting the de-

mands of appellant and granting relief to respondent as prayed. The two appeals taken from those judgments are now consolidated for the purpose of decision.

The findings determine that it was not the intent of the parties that the term "gross receipts" as used in the lease should include any money or things of value in excess of that actually received; that it was their mutual intent that meals served employees and owners should be deducted in computing gross receipts; that with respect to the vending machines, music boxes and public telephone they intended to include as receipts only the moneys received by respondent and not the gross moneys received by the owners of those devices; also that they intended that tips given by patrons to car hops should not be included in the gross receipts of the cafe. It was further found that respondent has accounted for all percentage rental due appellant. While the findings are ordinarily conclusive upon the appellate court, we have reviewed the entire record because of appellant's claim that the construction of the lease required no evidence beyond the pages of the writing.

The gross sales through the cigarette-vending machines prior to October 31, 1941, amounted to \$5,935.65. This sum was never received by respondent or entered upon its books as one of its receipts. For the period from May 31, 1940, to November 30, 1941, the total amounts received by respondent from the operation of the vending machines was at first based on commission which amounted to the sum of \$805.54. Following the latter date, respondent received from the concessionaire of those devices a compensation of \$35 per month. During the same period respondent received, as consideration for its concession, 50 per cent of the moneys deposited in the slots of the music boxes, aggregating \$1,656.95. Subsequent thereto, \$85 per month was paid by the owner of the music boxes for their continuous presence in the cafe. Such sums are the only moneys listed by respondent among its gross receipts from the concessionaires of the automatic machines. Prior to December 30, 1941, respondent received 15 per cent of the moneys collected by the public telephone installed in the premises. That percentage amounted to \$179.84. This is the only amount received by respondent from the telephone company. All of such sums were entered by respondent in its accounts

among its gross receipts and six per cent thereof was a part of the rentals paid to appellant.

[1] In resolving the problem presented we are not to confuse our own concept of what we would have decided if we had been the triers of fact with our immediate function to review the instant judgments. In reviewing the findings of a nisi prius court whose task was to interpret and construe a writing, we must bear in mind that in deriving the ultimate facts that court was privileged to consider not only the phraseology of the instrument itself but also the absence of provisions that would have defeated all uncertainty. In addition, it was at liberty to take judicial notice of customs that are universally prevalent.

[2-6] Assuming, arguendo, that the evidence received at the trial furnished no aid to the court in deriving its construction of the lease, still we should hold that the findings should be given such a construction as will support the judgment if such construction can be reasonably ascribed to them. *Cornell v. Hollywood Turf Club*, 32 Cal.App.2d 204, 89 P.2d 449. The doctrine is well established that if the construction given an instrument by the trial court is reasonable and consistent with the true intent of the parties the appellate court will not substitute another interpretation even though it seems equally tenable. *Kautz v. Zurich General Acc., etc., Co.*, 212 Cal. 576, 300 P. 34; *In re Estate of Wilson*, 40 Cal.App.2d 229, 104 P.2d 716; *In re Estate of Bourn*, 25 Cal.App.2d 590, 78 P.2d 193; *In re Estate of Boyd*, 24 Cal. App.2d 287, 74 P.2d 1049. When two inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its own inferences for those of the court below. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183; *Macart v. San Joaquin Building & Loan Association*, 45 Cal.App.2d 395, 114 P.2d 395. The construction of an ambiguous contract is first presented to the trial judge whose determination "will not be disturbed on appeal unless it be unreasonable and unjustified." *Wakefield v. Wakefield*, 37 Cal. App.2d 648, 654, 99 P.2d 1105, 1108; *Dreyer v. Cole*, 210 Cal. 399, 292 P. 123. But in view of the fact that some other evidence aside from the lease was received at the trial, and that it is not contrary to the construction placed upon the lease, all reasonable inferences must be indulged in sup-

port of the finding. *Taylor v. Bunnell*, 211 Cal. 601, 296 P. 288; *People v. Alexander*, 41 Cal.App.2d 275, 106 P.2d 450, 916. Where the facts and circumstances of a case are such as might reasonably and rightfully warrant the trial court in making its deductions, its findings will not be disturbed. *In re Baird's Estate*, 198 Cal. 490, 246 P. 324; *Davidson v. American Liquid Gas Corp.*, 32 Cal.App.2d 382, 389, 89 P.2d 1103; *Texas Company v. Wieczorek*, 36 Cal.App.2d 560, 98 P.2d 547. Respondent must be accorded the benefit of every inference that can reasonably be drawn in support of his judgment. *Crawford v. Southern Pacific Co.*, supra; *Davidson v. American Liquid Gas Corp.*, supra. All intendments must be resolved in favor of the correctness of the findings. *Crow v. Crow*, 168 Cal. 607, 143 P. 689; *Redmond v. City of Burbank*, 43 Cal.App.2d 711, 111 P.2d 375. The appellate court will not draw contrary inferences. *Morse v. Custis*, 38 Cal.App.2d 573, 101 P.2d 702. On an appeal upon the insufficiency of the evidence all conflicts must be resolved in favor of the judgment. All reasonable inferences must be drawn in its support. If there is any substantial evidence in support of the decision of the trial court a reversal is not justified. *Belton v. Silver Gate Theatres, Inc.*, 4 Cal.2d 1, 13, 47 P.2d 462.

#### Automatic Devices and Telephone.

[7,8] The sums received by respondent from the concessionaires of the automatic devices are the only income ever paid to respondent on account of their presence in the cafe. None of the moneys taken in by such appliances ever passed into the hands of lessee. The amounts paid by the concessionaires under the classification of either commissions or of flat rentals were for the privilege of installing the devices in the cafe. It was not unreasonable for the trial judge to determine that the sale of cigarettes by the vending machines was not the sale of merchandise contemplated by the agreement. A fair construction of the lease might reasonably impel the conclusion that "gross receipts" contemplated moneys coming into the treasury of respondent from the sales of service or of merchandise by the agencies of respondent. The phrase does not necessarily under a reasonable construction include packages sold from automatic vending machines. Neither would the music issuing from the "juke boxes" necessarily be reasonably classified as a



"service" performed by the lessee or by its employee. Respondent's gains from the music boxes as well as those from the vending machines might well be classified as revenues of the cafe derived from the installation of improvements in a joint adventure with the concessionaire who retains his own share of the profits distinct from those of respondent. The contract made by the lessee with his joint adventurer is not such service as is contemplated by the lease in specifying services the payments for which are to be included among the gross receipts. The cigarettes vended are the property of the concessionaire as long as they remain in the machine. The records played remain always the property of the licensee.

Having accounted to appellant for all sums actually received an account of the presence and operation of the automatic devices, it was not unreasonable to find that respondent had fairly performed its obligations in the premises. To augment the gross receipts by including the total sums that were paid into the mechanical agencies of the concessionaires would operate to exact the payment of rentals in excess of the amounts contemplated by the parties. It must have been intended by the lessor that the operator of a public cafe would so conduct his business as to enhance its magnitude as well as to hold expenses at a minimum. The installations of the appliances must be reckoned as aids to increase the rentals. Because, forsooth, they supplement the income of the lessee should not subject it to a penalty for its thrift and intelligent management.

[9,10] With respect to the telephone installed at the Drive-In for public use, such service may be found in almost any inclosure where people congregate for pleasure. It is an extension of a huge public service system of communication. Respondent is not a part of that system but, as another means for improving the attractiveness of the cafe and thereby its gross income, it licenses the public service corporation to install its instrument in the cafe. The collection of such rentals or license fees from the concessionaires and entering them as "receipts" was a reasonable compliance with the lease. The inhibition against subletting the premises was not designed to prevent the lessee from employing such modest measures and innocent agencies as might reasonably be calculated to extend the good will of the cafe, but rather was it intended to prevent occupancy by

tenants not approved by the lessor. It was not conceived to forestall the installation and use by respondent of inoffensive devices confined to two or three square feet and beneficial to and promotive of a successful conduct of the cafe.

[11] The contention that the prices of the meals served to employees should be added to the gross receipts has no justification. If they are to be deducted, as the lease provides, there could be no deduction if they were first added. The argument that they are a thing of value because they are part of the compensation paid the car hops is inane. It was because of their value that the lessor consented to deduct them from the gross. If they had been deemed of no value we must infer that mention of them would have been omitted.

#### Tips.

[12] Appellant contends that, inasmuch as respondent discharges its obligation to pay wages to the car hops by allowing them to retain the tips they receive from the patrons, therefore the receipt of such gratuities is for the use and benefit of respondent and constitutes a portion of the cafe's gross receipts. In support of this contention appellant arrays a number of evidentiary facts developed at the trial. About ten car hops were kept in the service by respondent. Pursuant to the provisions of the Labor Code (Sec. 351, St.1937, p. 203; Statutes 1929, p. 1971), respondent posted in its cafe the following notice: "All Tips or Gratuities given to our Car-Hops are retained by them as part compensation for their services." Every car hop declared in writing to the Unemployment Reserve Commissions (State and Federal) that she is "employed at a guaranteed wage of \$16.75 per week. I agreed to credit tips against wage and meals I eat." Each of them received tips in excess of the guaranteed sum; consequently no deficit was ever paid. Although no moneys were paid as wages to the girls who served the car-borne patrons, respondent set up "fictitious pay rolls" which showed that each girl received her guaranteed weekly wage of \$16.75.

However, such pay rolls performed the office of enabling respondent to maintain in force compensation insurance for the protection of the car hops against accidents that might be suffered in the course of employment. Neither respondent's scheme to carry such insurance nor its pay rolls in-

creased the gross receipts of the cafe. No moneys left by patrons on the service trays ever reached the treasury of respondent. They served only to reduce expenses of the cafe but never to increase its receipts. Nevertheless, appellant argues that while the tips were not actually entered in respondent's books as receipts, yet they were paid to the car hops for the "use and benefit" of respondent; that since they discharged respondent's obligation to pay the guaranteed wages of the car hops they therefore constitute a part of the Drive-In's "gross receipts." However, there is nothing in the lease itself from which it should necessarily be inferred that tips to be given to waitresses should become a part of the gross income of the cafe. Not only does the lease contain no such fact but because of the universality of the tipping custom, the absence of mention of the practice is conducive of the belief that the lessee did not suspect the lessor of having in mind the purpose of requiring such moneys to be included among the receipts of the cafe. The language used to define gross receipts may very readily have been construed as applicable only to the normal business of such an establishment. If appellant at the time of the lease intended to compute the rentals on the basis of such gifts it pursued a circuitous process to effect that intention.

A tip is not intended for the proprietor of a restaurant. It is a gratuity, i.e., "a free gift, a present." 28 C.J. 823. It is intended by the donor to be in excess of the compensation paid to the donee by the latter's employer or a gift where there is neither a consideration for it nor a legal obligation upon the donor to part with it. *Willingham Sash, etc., Co. v. Drew*, 117 Ga. 850, 45 S.E. 237. In the western world diverse motives incite the instincts of the tipper. With some it is to gratify the charitable impulse; with others it is the desire for gratitude or esteem or arises from a zeal for extending one's good will. Still in others the motive is to abide by an iniquitous practice under compulsion of popular opinion. But whatever be the motive of the giver, his tip remains a gift to the donee. It cannot be fairly said that such gifts are intended to be additional compensation for the viands or liquids purchased from the restaurateur.

Such was the prevailing concept of the "tip" at the time appellant offered his lease to his lessee, and such must have been the lessee's concept of the office of such gra-

tuities left with any employee of a public eating house. Indeed, in December, 1939, it had long been a universal custom in Los Angeles for the patrons of restaurants to herald their benevolence or munificence by bestowing coins upon waiters who in the course of their employment with grace or dignity arrayed the ordered comestibles before their benefactors. Surely the officers of appellant were familiar with that custom. At the very time of the execution of its lease a controversy had already arisen between the California Association of Drive-In proprietors and the Industrial Welfare Commission. That Division was about to make an order requiring drive-ins to pay wages to their car hops without regard to tips received from patrons. Within less than 50 days after the lease herein was signed the association of such drive-in proprietors had procured an injunction against the commissioner to prohibit the enforcement of its order. See *California Drive-In Restaurant Association v. Clark*, Cal. App., 129 P.2d 169, now pending in the Supreme Court.<sup>1</sup> Instead of inserting with specific phrases that gifts to car hops should be accounted for as an item of the gross receipts, the lessor chose to rely upon general terms. The language used in the lease was not such as would reasonably advise the lessee that the latter should calculate his rentals upon the gifts made to his employees while at work.

Not pleased with the finding derived, appellant contends here that since the lease requires no testimony to aid in determining the intention of the parties this court may reach a conclusion adverse to that of the court below. Conceding the premise, it were not unreasonable for us to do so because if the record were utterly void of any extraneous fact or reasonable inference in support of the construction given below, it would be reasonably practicable for us to take the writing alone and give it our interpretation. Civil Code, Sec. 1641; *Bank of America N. T. & S. Ass'n v. Schumacher*, 6 Cal.App.2d 651, 45 P.2d 239. But since the construction given by the trial court to the lease in the light of judicial knowledge and with the aid of reasonable inferences, we are obliged to rest the case upon that decision.

In support of its contention that tips should be included with the gross receipts, appellant cites respectable authorities. *Williams v. Jacksonville Terminal Co.*, 5 Cir., 118 F.2d 324; *Id.*, 315 U.S. 386, 62 S.Ct.

<sup>1</sup> For opinion of Supreme Court, see 140 P.2d 657.

659, 86 L.Ed. 914; *Harrison v. Terminal R. Ass'n*, 8 Cir., 126 F.2d 421; *Southern Ry. Co. v. Black*, 4 Cir., 127 F. 280. Those actions were brought by "red caps" to enforce payment of wages after they had appropriated tips which under their contract with the railroads were to be the moneys of the Railroads and be credited against the salaries of such employees. In those cases, the red caps collected the tips on behalf of their employers. Necessarily such moneys were the property of the railroads and such was the understanding at the time of their receipt by the red caps.

The judgment in each of the cases is affirmed.

W. J. WOOD and McCOMB, JJ., concur.



59 Cal.App.2d 46

**AMERICAN TELEPHONE & TELEGRAPH  
CO. v. CALIFORNIA BANK et al.**

Civ. 13794.

District Court of Appeal, Second District,  
Division 1, California.

June 2, 1943.

Rehearing Denied June 24, 1943.

Hearing Denied July 29, 1943.

**1. Courts** ⇨120

Under rule that when court of equity obtains jurisdiction it will decide the whole case, fact that money judgment sought in connection with equitable action for declaratory relief is below jurisdictional amount for superior court does not deprive superior court of jurisdiction. Code Civ.Proc. § 1060.

**2. Action** ⇨6

An action for declaratory relief is substantially an equitable proceeding. Code Civ.Proc. § 1060.

**3. Action** ⇨6

Complaint seeking declaration protecting corporation's right to reimbursement from defendants for amount it might be compelled to pay in stockholder's action against corporation by reason of corporation's transfer of stock certificate upon defendants' guaranty of stockholder's purported signature to stock power was not defective for failure to allege that signa-

ture was a forgery since existence of forgery was question of fact in stockholders' action. Code Civ.Proc. § 1060.

**4. Pleading** ⇨34(1), 218(1)

As against general demurrer, complaint will be liberally construed with view to substantial justice, any mere ground of special demurrer for uncertainty will be resolved in support of complaint, and demurrer will be overruled when necessary facts exist, although inaccurately stated, or appearing only by necessary implication. Code Civ. Proc. § 452.

**5. Pleading** ⇨34(1)

Rule of liberal construction of complaint does not permit insertion by construction of averments which are neither directly made nor within fair import of those which are set forth. Code Civ.Proc. § 452.

**6. Pleading** ⇨34(1)

Where averments of pleading may be held clearly to imply or state facts essential to statement of cause of action or to support theory upon which reliance must be had to make out case or defense, rule of liberal construction should be invoked and pleading construed with view to promotion of substantial justice between parties. Code Civ.Proc. § 452.

**7. Action** ⇨6

In corporation's action for declaration protecting its right to reimbursement on defendants' guaranty of stockholders' signature on stock power, where complaint alleged pendency of stockholders' action for conversion for transfer upon forged stock power and that defendants guaranteed signature, allegation that stock power was forged appeared by necessary implication and complaint was not insufficient for failure to contain such allegations. Code Civ. Proc. § 1060.

**8. Action** ⇨6

Corporation's complaint seeking declaration protecting its right to reimbursement on defendants for whatever it might be compelled to pay in stockholder's action by reason of corporation's transfer of stock certificate upon defendants' guaranty of stockholder's purported signature to stock power was sufficient to disclose a "present controversy" authorizing declaratory relief. Code Civ.Proc. § 1060.

See Words and Phrases, Permanent Edition, for all other definitions of "Present Controversy".



### 9. Action ⇨6

Complaint for declaratory relief which states facts from which it is manifest that there is a present controversy, is sufficient although complaint does not label it a controversy. Code Civ.Proc. § 1060.

### 10. Action ⇨6

The necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal right is one test of right to institute proceedings for declaratory judgment. Code Civ.Proc. § 1060.

### 11. Action ⇨6

Corporation's complaint alleging that it had transferred stock on defendants' guaranty of stockholder's signature to stock power, that stockholder instituted suit for conversion on claim that signature was forged, and that if corporation's right to recover from defendant damage it may be compelled to pay in stockholder's suit is not declared, recovery on guaranties will be barred by statute of limitations before stockholder's suit can be determined, stated cause of action for equitable relief. Code Civ.Proc. § 1060.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by American Telephone & Telegraph Company against California Bank and others for declaratory relief. From a judgment for defendants entered after demurrers to complaint have been sustained without leave to amend, plaintiff appeals.

Reversed and remanded.

John Mellen, of Los Angeles, for appellant.

Walker, Adams & Duque, of Los Angeles (Earl C. Adams and Robert S. Stevens, both of Los Angeles, of counsel), for respondent Stock Exchange.

Chas. E. R. Fulcher, of Los Angeles, for respondents California Bank and Kerr & Bell.

YORK, Presiding Justice.

This is an appeal from judgments of dismissal in favor of defendants after their several demurrers to the complaint had been sustained without leave to amend, in an action for declaratory relief brought under section 1060 of the Code of Civil Procedure.

Said section provides: "(Declaratory relief). Any person interested under a deed,

will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property \* \* \* may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

The questions involved in this appeal are as follows:

1. Does the complaint state a cause of action for declaratory or equitable relief?

2. Is appellant precluded from taking any steps against respondents for its protection during the pendency of, and prior to the determination of, an action against appellant in another state?

The complaint herein alleges that on February 28, 1938, respondent Los Angeles Stock Exchange Clearing House presented by mail for cancellation to appellant at its office in Boston, Certificate No. X-123246 for ten shares of appellant's capital stock to which was attached a separate assignment or stock power purporting to be signed by Anna B. Hill, to whom said certificate had been issued; with instructions to appellant to cancel said certificate and issue a new one in the name of Mrs. Lucy C. Pierce; that pursuant to said instructions appellant cancelled the certificate and issued a new one in the name of Mrs. Pierce which it mailed to Los Angeles Stock Exchange Clearing House with its letter of March 15, 1938.

It was further alleged that on said assignment or stock power and attached to said certificate respondents Kerr & Bell on February 28, 1938, affixed the following: "Signature Guaranteed—Kerr & Bell"; that on the same date, respondent California Bank affixed to said assignment attached to said certificate the following:

"Signature Guaranteed—California Bank, Los Angeles, by A. R. Weyer, Asst. Cashier."

It is then alleged that there is pending in New York State an action between Anna B. Hill and appellant Telephone Company in which the former seeks damages in the sum of \$2,817.50 by reason of the alleged conversion by appellant of 20 shares of appellant's stock "represented by certificates Nos. X-123245 and X-123246 for ten shares each, on the alleged ground that the defendant telephone company transferred said certificates without authority and without an endorsement made on said certificates by or on behalf of said Anna B. Hill and without any stock power or other written transfer executed by her, and further that said telephone company upon forged stock powers wrongfully accepted the surrender of said certificates and cancelled the same and in lieu thereof issued and delivered new certificates therefor to a person other than the said Anna B. Hill and wrongfully transferred the said shares on its books and stock records to such other person as the owner of said shares." In said action said Anna B. Hill prays that said telephone company be directed to issue new certificates to her or pay her the sum of \$2,817.50. A copy of the amended complaint filed in the pending New York State action was attached to and made a part of the complaint herein, marked Exhibit "D".

Then follows an allegation that the value of the ten shares represented by certificate No. X-123246 would be \$1,408.75 figured on the basis of the alleged value of the twenty shares which are the subject of the action pending in New York.

It is further alleged that it is the accepted custom among banks, trust companies, stock exchanges and similar business and financial institutions that the signature of their duly authorized agents accompanying or under the words "Signature Guaranteed" upon an assignment or stock power or power of attorney, when a certificate of stock and such assignment are presented to a transfer agent with instructions to transfer the stock represented thereby out of the name of the registered holder "was and is a guarantee \* \* \* that the signature of the registered holder affixed to the assignment \* \* \* is in all respects the genuine and correct signature of the registered holder of the stock and that the assignment is genuine and valid in all respects." Further, that respondents Kerr & Bell and California Bank guaranteed to

appellant that the signature of Anna B. Hill on the assignment attached to said certificate X-123246 was the genuine signature of Anna B. Hill, and that respondent Los Angeles Stock Exchange Clearing House in presenting the certificate warranted that the assignment on the certificate was genuine; that relying upon said guaranties appellant cancelled said certificate and transferred the stock thereby represented on its books from the name of Anna B. Hill and issued a new certificate for ten shares in lieu thereof in the name of Mrs. Lucy C. Pierce and delivered the same to the respondent Los Angeles Stock Exchange Clearing House pursuant to its said instructions; that appellant notified respondents as soon as it had knowledge of the claim of Anna B. Hill against it through the institution of the New York action, but respondents have refused to take any action in respect thereof.

Appellant's final allegation is to the effect that in the event judgment is obtained in the New York action adjudging that the stock power or assignment of certificate No. X-123246 is forged and invalid and that the transfer of the stock represented thereby was wrongful, as alleged in the complaint in the New York action, then respondents are liable to appellant for the amount of any loss or damage sustained by reason of the guaranties of said respondents as to the genuineness and validity of the assignment attached to said certificate, and of the signature of Anna B. Hill appearing thereon; that it will be several months before the action pending in New York State can be tried and decision rendered therein; that meanwhile the statute of limitations applying to written instruments in California will have run against appellant, to-wit: on February 28, 1942, with the result that appellant "will be deprived of substantial rights and property, of a legal remedy, that it will suffer irreparable loss and damage, and will have no redress from or recovery from ultimate loss unless and until this court shall grant it relief by issuing its decree or rendering its judgment" against respondents for whatsoever sum this appellant may ultimately lose or be adjudged liable for to Anna B. Hill in the pending New York action.

The prayer of the complaint is for judgment against respondents for such sum, together with interest and costs, and to such extent, as said Anna B. Hill may recover from appellant in the New York action, and for such other and further relief as to the court may seem meet and proper.

Respondents California Bank and Kerr & Bell urge that the appellant has failed utterly to state any cause of action, in that the complaint does not allege that the stock power was not genuine, that the certificate was invalid, that the signature of Mrs. Hill was a forgery, nor does it allege that said respondents failed to conform to the so-called custom, which they claim was improperly pleaded in said complaint.

Respondent Stock Exchange contends that the complaint herein is described as one for declaratory relief, but that it also seeks a money judgment depending upon the outcome of an action pending in another state; therefore, if the action is intended as one for declaratory relief, it fails to state a cause of action therefor "because no facts are set forth which give rise to a present controversy with respect to which the lower court can give judgment conclusively determining the rights of the litigants"; and if the complaint seeks a money judgment, it is defective in that the amount sought is not within the jurisdiction of the Superior Court.

[1,2] On the question of the jurisdiction of the superior court as to actions brought pursuant to section 1060 of the Code of Civil Procedure, it was held in *Cook v. Winklepleck*, 16 Cal.App.2d (Supp.) 759, 765, 59 P.2d 463, 466: "An action for declaratory relief is essentially an equitable proceeding. *McCaughna v. Bilhorn*, [10 Cal.App.2d 674], 52 P.2d 1025; 1 C.J.S. [Actions, § 18] 1046. When a court of equity once obtains jurisdiction of a case it will decide the whole case as between the parties and not leave any part of it for future litigation. *Becker v. Superior Court*, supra, 151 Cal. 313, at page 316, 90 P. 689; *Robinett v. Brown*, 167 Cal. 735, 141 P. 368; *Bettencourt v. Bank of Italy*, etc., 216 Cal. 174, 179, 13 P.2d 659. The superior court therefore retained jurisdiction over the case stated in the first count of the complaint herein and should have determined the issues as to the money award sought by plaintiff, even though, as in *Becker v. Superior Court*, supra, the amount thereof was below the limit of its jurisdiction in actions at law." See, also *Zimmer v. Gorelnik*, 42 Cal.App.2d 440, 447, 109 P.2d 34.

In a new article appearing in 5 Cal.Jur. 10 yr. Supp. 107 at 115, entitled "Declaratory Relief", it is stated:

"The complaint in an action for declaratory relief should, of course, allege facts

which warrant the granting of the relief sought. 'As we understand section 1060, supra, it is sufficient if a plaintiff allege facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and request that these rights and duties be adjudged by the court.' *Pacific States Corp. v. Pan-American Bank of California*, 213 Cal. 58, 1 P.2d 4, 981. A complaint which alleges facts which show that an 'actual controversy relating to the legal rights and duties of the respective parties' exists between the parties growing out of 'written instruments', and asks that these rights be adjudged by the court, is sufficient even though matters unnecessary to an action for declaratory relief are also alleged. *Oldham v. Moodie*, 94 Cal.App. 88, 270 P. 688. See, also, *California Canning Peach Growers v. Corcoran*, 14 Cal. App.2d 264, 57 P.2d 1360; *Tide Water Assoc. Oil Co. v. Curtin*, 41 Cal.App.2d 884, 107 P.2d 945; *Bogardus v. Santa Ana Walnut Growers Ass'n*, 41 Cal.App.2d 939, 108 P.2d 52. And if the plaintiff seeks both affirmative and declaratory relief, the complaint and prayer should be so framed as clearly to advise the trial court and the adverse party that the plaintiff is seeking, in addition to affirmative relief, a declaratory judgment. *Merchants' Trust Co. v. Hopkins*, 103 Cal.App. 473, 284 P. 1072; *Rolapp v. Federal Bldg. & L. Ass'n*, 11 Cal.App. 2d 337, 53 P.2d 974. The existence of an actual controversy should be averred (*Pacific States Corp. v. Pan-American Bank*, supra; *Tolle v. Struve*, 124 Cal.App. 263, 12 P.2d 61; *City of Alturas v. Gloster*, 16 Cal.2d 46, 104 P.2d 810); and, in complying with this requirement, it is sufficient to allege facts showing the existence of a controversy as to the legal rights and duties of the respective parties under a written instrument. It is not necessary to allege facts showing that the terms of a written instrument have been breached or violated. *Pacific States Corp. v. Pan-American Bank*, supra. \* \* \*

"Unless other relief is also sought by the complaint, the judgment should merely declare the rights of the parties under the instrument under consideration. \* \* \*

"It is provided by statute that a plaintiff may apply for declaratory relief 'either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time.' In view of this provision, under appropriate



pleadings, a judgment for accrued rent may accompany a declaration of the rights and duties of the parties to a lease (Tolle v. Struve, supra), and, in a proper case, the court, in addition to declaring the title of the plaintiff to the property in question, may enjoin the defendants from making a transfer thereof."

"A complaint alleging facts showing that others claimed title to corporate stock belonging to the plaintiff, either under an oral or written trust and under a fraudulent transfer, has been held to state a cause of action under a declaratory judgments act, allowing a suit in cases of actual controversy by one desiring a declaration of his rights or duties with respect to another, or in respect to, in, over, or upon property (105 A.L.R. 298.)" 16 Am.Jur. 335.

By the instant action filed on February 16, 1942, appellant apparently seeks a declaration protecting its right to reimbursement from respondents of whatever sum it becomes obligated to pay to Mrs. Hill under the judgment in the New York action by reason of respondents having guaranteed on February 28, 1938, the forged signature of Mrs. Hill to the assignment purporting to transfer stock certificate No. X-123246. Moreover, unless appellant is entitled to a judgment herein declaring its right to such reimbursement, respondents will be able to interpose to any future action brought by appellant based upon respondents' written guaranties, the defense that the statute of limitations ran against the same on February 28, 1942, at which time the judgment in the New York action had not been rendered.

[3] In support of their contention that the trial court properly sustained their demurrers to the complaint without leave to amend, respondents rely mainly upon appellant's failure to allege directly that the signature of Mrs. Hill to the transfer of stock was a forgery.

While this is true, it should not be overlooked that forgery was a question of fact to be determined in the New York action. Appellant alleged in its complaint herein the pendency of the other action attaching an Exhibit "D" a copy of the amended complaint filed in New York which was based upon the wrongful acceptance by appellant of the forged stock power and its transfer of Mrs. Hill's stock to a third person.

[4, 5] "In the construction of a pleading, for the purpose of determining its

effect, its allegations must be liberally construed, with a view to substantial justice between the parties.' (Code of Civ.Proc., sec. 452.) So as against a general demurrer, a complaint will be liberally construed with a view to substantial justice; any mere ground of special demurrer for uncertainty will be resolved in support of the complaint, and the demurrer will be overruled when the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication. The rule of liberal construction does not, however, permit the insertion, by construction, of averments which are neither directly made nor within the fair import of those which are set forth." 21 Cal.Jur. 53, sec. 30.

[6] "The rule in this state with respect to the construction of a pleading, for the purpose of determining its effect, is that its allegations must be liberally construed, with a view to substantial justice between the parties. Code Civ.Proc. § 452. It is not to be assumed from that rule of construction, however, that by construction there may be inserted in a pleading vital pretermitted averments, or averments which are neither directly set forth therein nor reasonably within the fair import of the language of those which are set forth. *But if the averments themselves may, without a strained construction, or without doing violence to language, be held clearly to imply or state a fact essential to the statement of a cause of action, or to the support of the theory upon which reliance must be had to make out a case or a defense, then the rule of the Code should be invoked and the pleading construed with a view to the promotion of substantial justice between the parties to the action.*" Howard v. D. W. Hobson Co., 38 Cal.App. 445, 449, 176 P. 715, 717. Emphasis added. See, also, Risco v. Reuss, 45 Cal.App.2d 243, 245, 113 P.2d 914, 915, where it is stated: "While upon a general demurrer a complaint will be liberally construed with a view to substantial justice (21 Cal.Jur. 54), yet such a rule should not be so applied as to allow an unmeritorious cause of action to be veiled by a subterfuge of loose and equivocal statements. Substantial justice requires that the essential facts appear at least by necessary implication from the allegations set forth."

[7] In the instant action, it is alleged "That there is now pending in the Supreme Court of the State of New York, County of

New York, an action \* \* \* in which the said Anna B. Hill seeks damages from the said defendant, the plaintiff herein, \* \* \* by reason of the alleged conversion by defendant telephone company of twenty (20) shares of said defendant's stock represented by Certificates Nos. X123245 and X123246 for ten shares each, on the alleged ground that the defendant telephone company *transferred said certificates without authority* and without an endorsement made on said certificates by or on behalf of said Anna B. Hill and without any stock power or other written transfer executed by her, *and further that said telephone company upon forged stock powers* wrongfully accepted the surrender of said certificates and cancelled the same and in lieu thereof issued and delivered new certificates therefor to a person other than the said Anna B. Hill and wrongfully transferred the said shares on its books and stock records to such other person as the owner of said shares." Emphasis added.

Following this are allegations to the effect that respondents Kerr & Bell and California Bank "guaranteed to plaintiff that the signature of Anna B. Hill on the assignment attached to certificate No. X123246 was the genuine signature of Anna B. Hill"; and that relying upon such guaranties appellant cancelled said certificate and transferred the stock represented thereby to a third person.

Therefore, the allegation that the assignment or stock power herein was forged clearly appears "by necessary implications from the allegations set forth." *Risco v. Reuss*, supra.

[8,9] It is contended by respondent Stock Exchange that no facts are set forth which give rise to a present controversy. As to this, it would appear that an actual controversy arose between the parties immediately upon the filing of the complaint in the New York action in which Mrs. Hill sought damages from appellant because it had theretofore issued its stock certificate to a third person based upon an alleged forged stock power. It cannot be maintained that a pleading is fatally defective "which states facts from which it is manifest that there is such a controversy, though the pleading does not label it a controversy, or say, in so many words that, as to a given issue of law, one party has thrown down the gauntlet." *Tolle v. Struve*, 124 Cal.App. 263, 270, 12 P.2d 61, 63.

[10] "One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights." *Updegraff v. Attorney-General*, 298 Mich. 48, 298 N.W. 400, 401, 135 A.L.R. 931, 933, and annotations.

[11] Since it is clearly apparent that appellant has no other remedy and must prevail in the instant action, if it is to preserve its legal right to recover from respondents the damage occasioned by their guaranties of a forged signature, the pleadings should be construed with a liberality consonant with equitable principles, in order that justice may be done between the parties hereto.

For the reasons stated, the judgments of dismissal are reversed and the cause remanded for further proceedings, in accordance with the views herein expressed.

DORAN and WHITE, JJ., concur.



59 Cal.App.2d 26

# WALTON v. WALTON.

No. 12120.

District Court of Appeal, First District,  
Division 1, California.

June 1, 1943.

Hearing Denied July 29, 1943.

## 1. Homestead ☞84

A wife may impress a homestead on property held in joint tenancy by herself and her husband as well as upon husband's separate property. Civ.Code, § 1238; Const. art. 17, § 1.

## 2. Homestead ☞118(2), 158

A valid homestead impressed on premises by wife may not be destroyed by husband, except by an instrument executed and acknowledged by husband and wife or by a decree of divorce. Civ.Code, §§ 1238, 1242, 1243; Const. art. 17, § 1.

## 3. Homestead ☞185

A valid homestead exempts the premises covered thereby from execution or

forced sale except as provided by statute. Civ.Code, §§ 1238, 1240, 1241, 1245; Const. art. 17, § 1.

#### 4. Partition ☞12(3)

Husband could not by partition action force sale of premises owned by husband and wife as joint tenants on which wife had declared a homestead, though premises were not susceptible of physical division and husband had abandoned wife who had obtained a decree for separate maintenance but marriage had not been dissolved by divorce. Civ.Code, §§ 1238, 1240-1243, 1245-1256; Code Civ.Proc. § 752; Const. art. 17, § 1.

#### 5. Homestead ☞12

The property rights of husband as joint tenant with his wife of premises on which wife has declared a homestead are not paramount to homestead rights secured to wife by homestead laws. Civ.Code, §§ 1238, 1240-1243, 1245-1256; Code Civ.Proc. § 752; Const. art. 17, § 1.

#### 6. Partition ☞12(3)

A "homestead", whether probate or statutory, may not ordinarily be made the subject of a partition action, since the head of a family has natural and moral obligation to provide for support of wife and children and other dependents, which is, if not paramount, equal to his obligation to pay debts, and land occupied as a homestead may be regarded as subject to a trust imposed by law which would necessarily be defeated by partition. Civ.Code, §§ 1238, 1240-1243, 1245-1256; Code Civ.Proc. § 752; Const. art. 17, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Homestead".

#### 7. Partition ☞12(3)

That premises owned by husband and wife as joint tenants on which wife declared a homestead exceeded in value the amount that could under statute be held exempt from creditors did not entitle husband as joint tenant to force a sale of premises by partition action, since statutory procedure for appraisal and sale of homestead and application to satisfaction of execution of proceeds of sale in excess of allowed exemption is available only to judgment creditors. Civ.Code, §§ 1238, 1240-1243, 1245-1256, 1260; Code Civ.Proc. § 752; Const. art. 17, § 1.

Appeal from Superior Court, Marin County; Benjamin C. Jones, Judge.

Action by Herbert K. Walton, also known as Herbert Kraft Walton, against Helen M. Walton for partition of certain realty owned by plaintiff and defendant as joint tenants and on which defendant had declared a homestead for the benefit of herself, her husband and minor child. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

J. W. Ehrlich, of San Francisco (Roy A. Sharff and Alfred M. Miller, both of San Francisco, of counsel), for appellant.

Freitas, Duffy & Keating, of San Rafael, and John J. Taaffe, of San Francisco, for respondent.

KNIGHT, Justice.

The question here involved is whether under the facts disclosed by the record a husband, owning a joint tenancy interest with his wife in real property upon which she has declared a homestead for the benefit of herself, her husband and their minor child, may destroy the homestead rights of the wife by a forced sale of the property brought about through the medium of an action to partition the property. The trial court held in the negative, and the husband appeals.

The following are the facts: Subsequent to their marriage the parties acquired, as joint tenants, a parcel of land in Marin county on which they built a home. The dwelling was completed in December, 1937, and was immediately occupied by them and their minor son as the family home. A few months later the husband abandoned his family and took up his residence elsewhere. The wife and the minor son continued to occupy the premises as the family home; and on or about March 8, 1939, the wife filed suit in the city and county of San Francisco for permanent maintenance and support. On April 4, 1939, on stipulation, an order was made for the issuance of an injunction pendente lite, enjoining the husband from transferring, encumbering, or otherwise disposing of any real or personal property, including stocks, bonds and other securities in his possession or under his control; and on April 10, 1939, he filed the present action in Marin county for the partition of the home property. Since it was not susceptible of physical division,



he asked that the premises be sold by a referee and the proceeds divided equally between himself and his wife. Two days later and on April 12, 1939, the wife declared a homestead on the property for the benefit of herself, her husband and their minor child. The suit for permanent maintenance and support was tried first; and on December 23, 1940, a decree was entered in favor of the wife wherein it was adjudged, among other things, that having established facts which would be sufficient to warrant the granting to her of a divorce upon the grounds of adultery and extreme cruelty, she was entitled to live separate and apart from him; and she was awarded the custody of the minor son and the husband was directed to pay to her certain sums of money, including a monthly sum for the support of herself and the minor son. Some four months later the present action was tried. The answer set up the existence of the homestead, and the trial court held that it was not subject to forced sale by the husband in an action in partition. Accordingly judgment was entered that plaintiff take nothing by his action. The constitutional and statutory provisions creating and insuring homestead rights, and the decisions construing and applying those provisions sustain the trial court's decision.

[1-4] Ever since the year 1868 it has been the declared law of this state that a wife may impress a homestead on premises held in joint tenancy by herself and her husband, as well as upon his separate property, Stats. 1867-68, p. 116; Section 1238, Civil Code; *Swan v. Walden*, 156 Cal. 195, 103 P. 931, 134 Am.St.Rep. 118, 20 Ann.Cas. 194; *Watson v. Peyton*, 10 Cal.2d 156, 73 P.2d 906; and that once the wife impresses premises with a valid homestead, the husband is without power to destroy it except in the manner provided by statute (*Mills v. Stump*, 20 Cal.App. 84, 128 P. 349), that is, by an instrument executed and acknowledged by the husband and the wife (§§ 1242 and 1243 of the Civil Code), or by a decree of divorce. *Lang v. Lang*, 182 Cal. 765, 190 P. 181. Furthermore, ever since the adoption of the codes, section 1240 of the Civil Code has declared that "The homestead is exempt from execution or forced sale, except as in this title provided" (referring to Title 5, Part 4, Div. 2, Civil Code). The foregoing statutory enactments have been adopted pursuant to mandates found in both the

Constitution of 1849, Art. XI, § 15, and in the present Constitution, Art. XVII, § 1, to the effect that "The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families." The exceptional cases referred to in said section 1240, wherein the homestead is subject to execution or forced sale, are enumerated in sections 1241 and 1245 of said code, and they all relate to judgment creditors. The former section reads: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises. 2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, guilders, laborers of every class, materialmen's or vendor's liens upon the premises. 3. On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant. 4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." And the latter section, 1245, was enacted to cover the cases of judgment creditors not specified in section 1241. It provides in substance that "When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 1241 is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter" invoke the benefits of the court procedure prescribed by the succeeding code sections, to have the premises appraised; and if it appears from the appraisal that the land exceeds in value the amount of the homestead exemption and the premises cannot be divided, the premises must be sold at forced sale, and the proceeds to the amount of the homestead exemption paid to the homestead claimant and the balance applied to the satisfaction of the execution. Civil Code, §§ 1246 to 1256. The authorities construing and applying the said code sections are uniform in holding that except as provided therein a valid homestead exempts the premises covered thereby from execution or forced sale. *Jacobson v. Pope & Talbot*, 214 Cal. 758, 7 P.2d 1017. Admittedly appellant's legal status can in no sense be classified as a judgment creditor; nor on account of the negative provisions of said sections 1242 and 1243 could he bring about the destruction of the homestead by way of alienation, abandonment, or encumber-

ing the same, unless the instrument of conveyance, encumbrance or abandonment was executed and acknowledged by his wife. Therefore, as stated by the trial court in its memorandum opinion, the conclusion is inescapable that the husband may not, in view of the prohibitive language employed in the enactment of said section 1240, force a sale of the homestead premises by means of an action in partition.

[5] Appellant contends, however, that despite the constitutional and statutory provisions insuring protection against the forced sale of homestead premises, he is entitled, as the owner of a joint interest in the property, to invoke the provisions of section 752 of the Code of Civil Procedure, which provides for the partition of real property, and that therefore, since the premises herein are not capable of being divided and allotted in kind, he is entitled to force the sale thereof, and to receive a full one-half of the proceeds of the sale. In other words, he argues that his property rights as a joint tenant are paramount to homestead rights secured to his wife by the homestead laws. With this contention and argument we are unable to agree.

[6] As stated in California Jurisprudence, it is a general rule that a homestead, whether probate or statutory, may not be made the subject of an action for partition. 20 Cal.Jur. p. 611. The rule is founded largely upon the principle that there is a natural and moral obligation on the head of the family to provide for the support of his wife and children and other persons dependent upon him, which is, if not paramount, equal to his obligations to pay his debts (13 R.C.L. p. 545) and that land occupied as a homestead may be regarded as subject to a trust imposed by law which would necessarily be defeated by partition. *Mills v. Stump*, supra. The case last cited involved a probate homestead covering 25 acres which was set apart to the widow from a 320-acre tract, and the entire tract was subsequently distributed in undivided shares to the widow and other heirs as tenants in common. The widow brought suit to partition the 295 acres not included in the homestead, and the other heirs sought to include in the partition action the homesteaded 25 acres. The court held that this could not be done, that "Section 752 of the Code of Civil Procedure was not intended to authorize the partition of the homestead interest during its enjoyment", [20 Cal.App. 84, 128 P. 352] and that therefore the

homesteaded 25 acres could not be brought into the partition action. In so holding the court went on to say: "The homestead interest in land is the offspring of statute. created for the humane and benevolent purpose of furnishing what its designation indicates—a home for the persons for whom the law awards it, and in its enjoyment it is by law made a sanctuary against execution creditors and should be against every other form of hostile attack. In the present case the homestead having been carved out of the husband's separate estate was decreed to plaintiff for her sole use during her natural life. But plaintiff does not hold this interest as parcenary, joint tenant, or tenant in common. While it partakes of some of the attributes of a joint tenancy, it is not such an interest in strict legal sense nor in the sense the term is used in the statute. It is not by virtue of her homestead interest that plaintiff brings the action, but as a tenant in common of the land with defendants. Her homestead interest is of such character as of itself to be incapable of partition. 'The purpose of a homestead is to secure a home to each and all those clothed with a homestead right—to each and all of them; and the power of a stranger to enter into possession of the land, and, as a tenant in common to interfere with its occupancy and control by the homestead claimants and have it partitioned, or sold, if division be impracticable, would be inconsistent with the very nature of a homestead and violative of the very purpose for which a homestead is created.' *Moore v. Hoffman*, 125 Cal. 90, 57 P. 769, 73 Am.St.Rep. 27. The tenants in common of the land in question hold subject to the homestead right and have no right of possession and the court can give them no right of possession of the portion impressed with the homestead by virtue of their tenancy in common. It is held by plaintiff by title distinct from that held by her and her cotenants as tenants in common of the fee. 'It is the prevailing rule that the widow is entitled to a homestead as well against the heirs as against the creditors of her deceased husband, and that during the continuance of her right of occupancy there can be no partition of the homestead at the suit of the heirs, and this though there are no creditors.' 15 Am. & Eng.Ency. of Law, p. 699; 29 Am. & Eng.Ency. of Law, p. 1162. 'Lands occupied as a homestead may well be regarded as subject to a trust imposed by law which would necessarily



be defeated by partition. It must therefore be denied, although the title is vested in two or more persons, as long as they or any of them remain entitled to occupy the property as a homestead.' 30 Cyc. 187. Mr. Freeman states the rule as follows: 'The homestead cannot be partitioned against the objection of the surviving wife, on the application of the other heirs, and after the decease of the husband. She has the right, at least as long as she resides on the premises with her family, or with any minor children of the family, to occupy and enjoy the whole homestead. The heirs cannot curtail this right by compelling her to submit to a partition of the premises, and to confine her subsequent enjoyment to the portion assigned to her.' Freeman on Cotenancy and Partition, § 60." And further on the court said: "The power to sell, given by the statute and under the general rule, cannot be invoked to solve the difficulties, for the homestead is of such a nature and was instituted for such a purpose as to forbid its compulsory sale. Once a homestead, always a homestead until it is destroyed in a way authorized by statute, or by its voluntary surrender by the person entitled to it, such person being competent so to do."

A case involving a statutory homestead is *Swan v. Walden*, supra. There three contiguous lots (3, 4 and 5) were acquired by Walden and his wife, as joint tenants, and the wife declared a homestead on lots 3 and 4. Subsequently, the homestead never having been abandoned, the husband executed a deed of grant of all his interest in the three lots to Swan, who brought an action to partition all of the property covered by the deed. Judgment passed for Swan, Mrs. Walden appealed, and the judgment was reversed. It was held, among other things, that since the wife did not join in the execution of the Swan deed the homestead she had impressed on lots 3 and 4 could not be destroyed by an action for partition.

At the time that case was decided, said section 1238 contained no express provision, as it does now, that a wife may declare a homestead on property held in joint tenancy with her husband. It provided merely that "If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property \* \* \*"; and in holding that under the wording of the statute as it then stood, a

wife could impress a homestead on property held in joint tenancy by herself and husband, the court said [156 Cal. 195, 103 P. 933, 134 Am.St.Rep. 118, 20 Ann.Cas. 194]: "Here the wife seeks to impress the *whole* land with the homestead characteristic. This she may do as to her own interest, which is her separate property, and this she may do as to her husband's interest, since she has the power to declare a homestead upon the husband's separate property, though he has no such power over hers. The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it. There is no occasion for segregation or partition or delimitation of boundaries, since the homestead attaches to all of the estate and all of the land." (*Italics ours.*) In other words, the decision in that case rested upon the theory that the interest of each spouse was separate property and that since the wife had power to declare a homestead on her husband's separate property, and she was the owner of the remaining interest, the whole of the estate and all of the land was subservient to the homestead. *Watson v. Peyton*, supra. It follows necessarily, therefore, that since a husband cannot in any manner, without his wife's consent, destroy a homestead declared by her on property of which he is sole owner, he cannot by an action in partition bring about the destruction of a homestead declared by her on property in which he owns a lesser estate, namely, only a joint tenancy interest. In the case of *Lang v. Lang*, supra, the homestead was declared on community property, and the court there fully recognized the existence of the general rule above mentioned that a homestead is not subject to an action for partition, but it was held that under the facts of that case the rule did not there apply for the reason that the family was severed by a decree of divorce and the qualities of the homestead estate were thereby destroyed.

The same general rule prevails in other jurisdictions (13 R.C.L. p. 686; Thompson on Real Property, Vol. 1, p. 1011), among them being the state of Minnesota, wherein a case arose which is identical in all of its essential facts with the one here presented, except that there the action in partition was brought by the wife. *Grace v. Grace*, 96 Minn. 294, 104 N.W. 969, 970, 4 L.R.A., N.S., 786, 113 Am.St.Rep. 625, 6 Ann.Cas. 952. At the time she declared the *home-*



stead, title to the property stood in the name of the husband and he afterwards conveyed to her an undivided one-half interest therein. Later, on account of his cruel treatment, she left her husband and abandoned the premises as her home, and several months afterwards brought an action for the partition of the homesteaded property. The same contentions were there made in behalf of the wife that are here urged in behalf of the husband. In stating them the court there said: "The contention of the plaintiff [the wife] is that the wife's undivided half interest was held by her free from any present vested and completed right of her husband; that the husband's right in an undivided part of the premises is not paramount, but is subordinate, to the legal title in the plaintiff, owning the other undivided interest; that the wife, having abandoned the premises for homestead purposes, may compel partition in the same manner as a stranger might; that the husband's homestead right is of necessity subject to the rights of the cotenant; and that where a tenant in common has homestead rights, and partition in kind between him and a cotenant is impracticable, a sale of the whole may be had, but the homestead attaches to and protects the proceeds." The contentions were held to be without merit, and in so holding the court said: "The law and the reason of the law, however, deny the ability of a wife by leaving her husband to acquire the right to compel partition of her husband's homestead, in which she has an undivided half interest and which she occupied with him as a homestead. A homestead can be owned and occupied by husband and wife as tenants in common. *Lozo v. Sutherland*, 38 Mich. 168. There may be a homestead right in an undivided interest in premises. *Kaser v. Haas*, 27 Minn. 406, 7 N.W. 824; 25 Cent.Dig. [Homestead] § 121, cols. 2245, 2246. In this case, accordingly, defendant had at least a homestead interest in this undivided half of the premises (*Riggs v. Sterling*, 60 Mich. 643, 650, 27 N.W. 705, 1 Am.St.Rep. 554), although it may well be doubted whether the homestead rights of the husband are limited to that interest. *Ehrck v. Ehrck*, 106 Iowa, 614, 76 N.W. 793, 68 Am.St.Rep. 330; *In re Emerson's Homestead*, 58 Minn. [450], 453, 60 N.W. 23. Neither the husband nor the wife can dispose of his or her right of that character without the express consent of the other. Secs. 5521, 5522, 5532, Gen.

Stat.1894; Chap. 255, p. 390, Laws 1905; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N.W. 817. And see *Eaton v. Robbins*, 29 Minn. 327, 13 N.W. 143; *Sherrid v. Southwick*, 43 Mich. 515, 5 N.W. 1027; 25 Cent. Dig. [Homestead] § 191, col. 2330. \* \* \* The husband and the history of the use of the premises in this case had determined the homestead of the family. *Moss v. Warner*, 10 Cal. 296. Admitting that all the homestead rights there existed were in the husband's undivided half, under neither statute could the wife make a valid sale or conveyance destroying the homestead. The law will not allow her to do indirectly through a suit for partition what she could not do directly by sale or conveyance. *Mitchell v. Mitchell*, 101 Ala. 183, 13 So. 147 (a case essentially similar to the one at bar); *Brooks v. Hotchkiss*, 4 Ill.App. 175; *Holbrook v. Wightman*, 31 Minn. 168, 17 N.W. 280; *Umland v. Holcombe*, 26 Minn. 286, 3 N.W. 341; *Hafer v. Hafer*, 33 Kan. 449, 6 P. 537; *Trumbly v. Martell*, 61 Kan. 703, 60 P. 741." The court then goes on to quote from the memorandum opinion filed by the trial court, in which it said in part: "The homestead, under our public policy and law, is the one secure place where the strong hand of the law is stayed, and over which only by consent of both husband and wife can its power be exercised. The beneficent idea undoubtedly is to make and preserve for every family a shelter of a home, to be free, as long as husband or wife or a minor child shall live and occupy it, from the common vicissitudes of life. \* \* \* To hold that either husband or wife can, at will, by leaving the common homestead, destroy its legal character as a homestead, would lead to such disastrous results that it could not for a moment be tolerated. Thus at the will of either the homestead could be subjected to judgment lien and sale and the right of shelter denied to the other spouse and even the little children." To this the reviewing court added: "The wife is not left without a remedy applicable to such cases. She can terminate the homestead right by an absolute divorce *Kern v. Field*, 68 Minn. 317, 71 N.W. 393, 64 Am.St.Rep. [479], 482 or, without a divorce, by an application under section 5535, whenever she would be entitled to a divorce."

In view of the foregoing it is our conclusion that the trial court herein properly held that the homestead could not be destroyed by the husband through the medium

of an action for the partition of the property.

In 1929 said section 1238 was amended, St.1929, p. 339, by adding the following sentence thereto: "Property, within the meaning of this section, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive"; and in a very recent case (In re Estate of Kachigian, 20 Cal.2d 787, 128 P.2d 865, 868) it was held that since the adoption of the said amendment a wife may declare a valid homestead on property held by her husband and a third person as tenants in common; and by way of argument supporting its decision on that point the court went on to say: "It cannot be said that the rights of the other cotenant are in any way prejudiced, as the homestead claimant, or his surviving family, acquires only such rights of occupancy as he had before the creation of the homestead, and the other cotenant's interest is in no way affected; for example, his right to use the property remains exactly as before and he may sell or assign his undivided share. If he objects to his cotenant, his remedy is by partition. Code Civ.Proc., § 752, et seq.; 20 Cal.Jur. 586, et seq.; see, also, other remedies between cotenants enumerated in 7 Cal.Jur. 363, et seq." But for obvious reasons the observations thus made can have no application to a case such as this where complete title to the homesteaded property is held by the husband and the wife.

We have found nothing in the cases cited by appellant from outside jurisdictions which may be said to be here controlling. Some of them involved homesteaded property held by one of the spouses and a third person; others are based on statutory provisions unlike ours; and the remaining ones involved factual situations different from those here presented.

[7] Nor is the situation here altered by the fact that in her declaration of homestead the wife stated that she estimated the value of the premises to be \$50,000. In this connection it may be stated that appellant admitted that his net financial worth exceeded \$300,000, and at the time of trial he valued the premises in question at only \$15,000 or \$20,000. However, the matter of the value of the homesteaded premises presents a false issue, for as said in Lubbock v. McMann, 82 Cal. 226, 22 P. 1145, 1147, 16 Am.St.Rep. 108, "The whole

lot being adapted to use as a homestead, and actually used as such at the time of dedication, it then became, as an entirety, affected with the homestead character. And this is so without regard to the value of the lot, either at the time of its dedication or at any subsequent period. There is no statutory limit as to the value of the property which may be selected, and upon which the character may be impressed. When the attributes of residence and selection according to law exist so as to express its essence, the homestead becomes an *estate in the premises* selected, exempted by law from forced sale. They may be of greater or less value than the interest in them exempted by law." See, also, Ham v. Santa Rosa Bank, 62 Cal. 125, 139, 45 Am.Rep. 654.

It is true that section 1260 of the Civil Code provides that "Homesteads may be selected and claimed: 1. Of not exceeding five thousand dollars in value by any head of a family; 2. Of not exceeding one thousand dollars in value by any other person." But that section was enacted for the benefit of that class of judgment creditors embraced within section 1245 of said code, who are given the right under the preceding code sections to institute the proceedings prescribed therein for the ascertainment of the value of homesteaded premises, and upon the sale thereof to have the proceeds of the sale over the amount of the exemption fixed by said section 1260 applied to the satisfaction of the execution. As already pointed out, the proceeding provided for in those code sections is not available to appellant because admittedly he is not a judgment creditor in any sense of the term.

In further support of the judgment it is urged that appellant in instituting the partition suit against his wife did so for malicious and spiteful reasons, and to oust her from the home so that he might obtain possession thereof for himself, and that therefore, since a suit in partition calls for the application of equitable principles (Akley v. Bassett, 189 Cal. 625, 209 P. 576), the trial court was justified in dismissing the suit. There was some evidence introduced to that effect, but as the trial court held, and correctly so in our opinion, the appellant's motives in bringing the action were quite immaterial to a determination of the major issue involved.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

58 Cal.App.2d 815

**PEOPLE v. TOLMACHOFF.**

**Cr. 3679.**

District Court of Appeal, Second District,  
Division 1, California.

May 27, 1943.

Rehearing Denied June 11, 1943.

Hearing Denied June 24, 1943.

**1. Perjury**  $\S$  3

The word "wilfully" in a perjury prosecution means that witness made allegedly perjurious statement with the consciousness that it was false, with consciousness that witness did not know that it was true, and with intent that it should be received as a statement of what was true in fact. Pen.Code, §§ 118, 125.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilfully".

**2. Perjury**  $\S$  33(2)

Evidence supported finding that defendant testified falsely in a criminal action in which another person was accused of kidnapping for purpose of robbery, with a bad purpose, and therefore "wilfully", so as to authorize conviction of perjury. Pen.Code, §§ 118, 125, 209.

**3. Perjury**  $\S$  34(4)

Where falsity of defendant's testimony in prosecution for kidnapping for purpose of robbery that kidnapper was with defendant in theater on evening alleged crime was committed was established by two witnesses who testified as to defendant's whereabouts on evening of alleged crime, quantum of evidence adequately met requirements of Penal Code to sustain conviction for perjury. Pen.Code, § 1103a.

**4. Perjury**  $\S$  34(4)

Even if composite testimony of two witnesses in perjury prosecution whose testimony tended to show that kidnapper was not with defendant at theater on night of alleged kidnapping for purpose of robbery as testified by defendant were regarded as testimony of one witness, evidence that theater program which defendant testified she received at theater on such night was not printed until after date of kidnapping was a corroborating circumstance and sufficient to sustain conviction for perjury. Pen.Code, § 1103a.

**5. Perjury**  $\S$  32(6, 8)

Where perjury prosecution was based on defendant's testimony in prosecution for kidnapping for purpose of robbery as to kidnapper's whereabouts on evening of alleged crime, testimony of witnesses as to events which transpired after witnesses had left place at which kidnapper was alleged to have remained with victim was properly admitted in determining materiality of defendant's testimony in kidnapping prosecution, and as showing that defendant testified falsely. Pen.Code, § 209.

**6. Criminal law**  $\S$  800(2)

In perjury prosecution, refusal to give instructions defining words "recollection" and "recall" was proper, in view of defendant's positive testimony at prosecution on which perjury prosecution was based, and for further reason that words needed no definition. Pen.Code, §§ 118, 125.

**7. Criminal law**  $\S$  822(1)

Instructions should be considered in their entirety.

**8. Criminal law**  $\S$  822(13)

Where reading of all instructions showed that trial court fully and fairly advised jury as to kind, quality and degree of proof necessary before accused could be convicted of perjury, instructions were not erroneous. Pen.Code, §§ 118, 125.

**9. Criminal law**  $\S$  1043(2)

Where an objection to evidence is made in general terms, and objection could have been cured by the party offering testimony if reason for which it was objected to had been given in trial court, an appellate tribunal generally will not consider such objection to admission of evidence.

**10. Criminal law**  $\S$  1043(2)

Where proffered evidence was allegedly imperfect because of lack of preliminary proof, which might have been supplied by party offering such evidence, and specific ground of objection was not specified in trial court, objection could not be urged on appeal.

**11. Perjury**  $\S$  32(6, 8)

Where perjury prosecution was based on defendant's testimony at prosecution for kidnapping for purpose of robbery that alleged kidnapper was with defendant at theater on night of alleged crime, theater programs offered in evidence by defendant at trial of kidnapper were admissible in perjury prosecution to prove that defendant



testified wilfully and falsely to a matter material to issues presented in the kidnapping prosecution. Pen.Code, §§ 118, 125.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Mary W. Tolmachoff was convicted of perjury, and she appeals from order denying her a new trial.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., of Long Beach, and Jere J. Sullivan, Deputy Dist. Atty., of Los Angeles, for respondent.

WHITE, Justice.

The defendant was charged in an information filed by the District Attorney of Los Angeles County with the crime of perjury and subsequently was tried on said information in the superior court of said county. At such trial the jury found her guilty. Thereafter, defendant made a motion for a new trial which was denied. Thereupon further proceedings were suspended, no judgment was pronounced, and defendant was placed on probation for the term of five years on condition that she serve three months in the county jail. Defendant appeals from the order denying her a new trial.

The information herein charges that the alleged perjury was committed by the defendant as a witness in a criminal action tried in the superior court of Los Angeles County and in which one Nick Homotoff and Cecil H. Salter were accused of the crime of kidnapping for the purpose of robbery, in violation of section 209 of the Penal Code.

It appears that on July 23, 1941, Wesley Sherman was employed as a bookkeeper for Motor Discount Company in Los Angeles and resided at 380 Dearborn Street in the city of Pasadena. On said date one Arthur Taube, driving an automobile and accompanied by the aforesaid Nick Homotoff and Cecil Salter, followed Mr. Sherman as the latter drove away from his Los Angeles office to his Pasadena home at which place he arrived about 8:30 o'clock in the evening. Mr. Sherman drove into his driveway while Taube parked the automobile he was driving a short way from

Sherman's house where Salter and Homotoff left the automobile and went to the garage at the rear of the Sherman residence. Within a few minutes Homotoff returned to the automobile and Taube got out and accompanied Homotoff back to the garage where he observed Mr. and Mrs. Sherman and the latter's mother, Mrs. Whitehouse. On this occasion Taube, Salter and Homotoff were armed with deadly weapons. The evidence indicates that on the evening in question Mrs. Sherman, who was at home, retired about 8:30 and shortly after her husband came into the house accompanied by Cecil Salter, who had a gun, and Salter compelled her to get out of bed and deliver to him what money she had, amounting to \$1.85. Thereupon Salter at the point of a gun ordered Mr. and Mrs. Sherman to go outside the house where Mrs. Sherman's mother was seated in an automobile with another man, the latter of whom had her covered with a gun. Salter asked Mr. Sherman for the combination of the finance company's safe and Mr. Sherman pleaded ignorance thereof but Mrs. Sherman volunteered the statement that she knew who could open the safe and that if the robbers would leave her mother at home with Mrs. Sherman's 14-year old boy who was ill, she would take them to the home of Mr. Ide, owner of the finance company, who lived in San Marino. Thereupon the mother, Mrs. Whitehouse, was taken into the house by Homotoff who was armed with a gun. At the direction of Salter, Mr. and Mrs. Sherman entered the automobile and were driven to Mr. Ide's home. At that point Salter ordered Mr. Sherman out of the car and the two went to the front door of Mr. Ide's home, with Salter hiding in the bushes. It appears that Mr. Ide was not at home but was visiting at the residence of a Mr. Parker, to which place the Shermans accompanied by Salter and Taube drove, and when they arrived at the Parker home, Salter again hid in some bushes while Sherman, at the former's direction, went to the door and asked for Mr. Ide, the latter of whom appeared but suddenly turned back into the house and closed the door. At this juncture Salter dashed for the automobile and drove away accompanied by Taube and Mrs. Sherman. Near Fair Oaks Avenue in Pasadena the automobile was stopped and Salter directed Taube to telephone to the Sherman home and advise Homotoff to depart therefrom. Later, at about 10:45 o'clock that night,

Mrs. Sherman was put out of the car in a vacant lot after Salter had taken her diamond ring.

There was positive testimony given by Mrs. Whitehouse that from about 8:45 p.m., until 9:45 she was held captive by Nick Homotoff in the kitchen of her daughter's home. She positively identified him and further testified that about 9:45 the telephone rang, Homotoff answered it, after which he tore the instrument from the wall and ran out of the house. At the trial wherein Homotoff and Salter were charged with kidnapping Mrs. Whitehouse for the purpose of robbery, Taube testified on behalf of the prosecution and his evidence established the fact that Homotoff was one of the participants in the outrage perpetrated upon Mr. and Mrs. Sherman and the latter's mother. At the same trial, the defendant in the instant case testified as a witness for the defendant Homotoff. She testified that she had known Homotoff since the first day of 1941; that she was engaged to be married to him, that on the night of July 23, 1941, defendant Homotoff was with her from about 7:30 or 8 o'clock until some time between 11:30 and midnight. She testified that Homotoff accompanied her to a performance at the Mayan Theatre in the city of Los Angeles; that it was the first time she had ever been to a theatre and that she saved the program, which she produced at Homotoff's trial and which was offered in evidence. A review of the record in this case discloses that the defendant herein positively, unequivocally and without reservation testified that Homotoff was with her, going to and from her home and at the theatre, at all times between approximately 7:30 or 8 o'clock and midnight.

At the trial of defendant herein for perjury, a police officer testified that on the morning of May 14, 1942, defendant herein requested an interview with him at which she said "Well, now that it has been proved that Nick and I was not to the show on the 23rd of July, I will say I guess I was not there". The officer asked defendant if she would put her statement in writing to which she consented, writing in part "I thought I'd help him in some way. So that's why I came to court and brought the programs \* \* \*. I have a feeling in my heart that Nick was not involved in that case. So that's why I testified to help him. \* \* \*"

At defendant's trial on the perjury charge, Mary Lacey, secretary to the publisher of the program at the theatre which defendant testified she and Homotoff attended, gave testimony that the program, identified by defendant herein at Homotoff's trial and offered in evidence in the latter's behalf, was not published in July but about August 27, 1941.

Appellant first insists that the judgment should be reversed because of the insufficiency of the evidence to sustain the guilty verdict. In support of this claim we are reminded that defendant's testimony was given with reference to events that occurred some ten months prior to the time she testified thereto and that her testimony reflects her best recollection, honestly given, as to what occurred nearly a year prior to the time when she testified. While it is true that upon cross-examination at the trial where she testified in behalf of Homotoff, the defendant herein used such terms as "I am pretty sure"; "I am pretty sure it is that date"; nevertheless she at no time receded from the claimed verity of her positive testimony given on direct examination that Homotoff could not have participated in the crime charged against him in the city of Pasadena on the evening of July 23, 1941, because he was with the defendant herein attending a Los Angeles theatre. This is evidenced by the following questions and answers thereto occurring during her cross-examination at Homotoff's trial:

"Q. How long before you went to the theatre? A. Well, we went on July 23rd, and we quarrelled on the Thursday before.

"Q. What I am trying to figure out is how you know you went to the theatre on July 23rd? A. Well, by my birthday".

[1,2] Furthermore, she testified that she saved the program which she received at the theatre on the occasion which she testified marked the first time in her life she had attended a theatrical performance. A review of the testimony given by the defendant herein at the trial of Homotoff satisfies us that her positive declarations as to Homotoff's whereabouts on the evening in question were not based upon any belief in the truth thereof but rather were actuated by the belief upon her part, expressed in her signed statement made to the police, wherein among other things she said "I have a feeling in my heart that Nick (Homotoff) was not involved in the case.

So that's why I testified to help him". The use of the word "willfully" in a prosecution for perjury simply means that the witness made the allegedly perjurious statement with the consciousness that it was false; with the consciousness that he did not know that it was true and with the intent that it should be received as a statement of what was true in fact. *People v. Okomoto*, 26 Cal.App. 568, 570, 147 P. 598; *People v. Johnson*, 14 Cal.App.2d 373, 379, 58 P.2d 211. The state of the record before us clearly justified the jury in finding that the defendant herein testified falsely; with a bad purpose and therefore "willfully" as that term is used in the statute. § 118, Penal Code. Furthermore, an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. § 125, Penal Code.

[3,4] Appellant next insists that the evidence does not measure up to the requirement of the law that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances. § 1103a, Penal Code. This claim is without merit. The witness Taube testified that Homotoff rode with him in the automobile to the Sherman residence and went into the house with Mrs. Whitehouse where he remained on the evening of July 23rd, 1941, until about 9:45 p.m., when he was advised through a telephone call to leave. Mrs. Whitehouse testified that Homotoff held her captive in the house from about 8:45 to 9:45 o'clock on the evening in question. Appellant contends that the testimony of these two witnesses, combined, only equals the testimony of one witness. With this we do not agree. Section 1839 of the Code of Civil Procedure defines corroborative evidence as additional evidence of a different character, to the same point. If Taube had testified that Homotoff was in the house with Mrs. Whitehouse at the time the latter testified he was, then Taube's testimony might be said to be cumulative as distinguished from corroborative, but such is not the case and Taube's evidence was given as to where Homotoff was prior to his entry into the house with Mrs. Whitehouse. His testimony was therefore of a different character but to the same point as that of Mrs. Whitehouse, viz., that Homotoff was not at a Los Angeles theatre with defendant herein, as testified to by her, and that her testimony in that regard was therefore

false. The cases of *People v. Burcham*, 62 Cal.App. 649, 217 P. 558, and *People v. Layman*, 117 Cal.App. 476, 4 P.2d 244, cited and relied upon by appellant are not therefore applicable to the facts here present. Even though it be conceded that the composite testimony of Taube and Mrs. Whitehouse must be regarded as the equivalent only of the testimony of one witness, there remains the corroborative testimony of Mary Lacey that the company by which she was employed printed the programs for the Mayan Theatre in Los Angeles and that the program that defendant testified she received at the theatre in Los Angeles on the evening of July 23, 1941, was not printed until after August 27, 1941. The quantum of evidence and corroborating circumstances shown herein must therefore be held to adequately meet the requirements of section 1103a of the Penal Code. *People v. Follette*, 74 Cal.App. 178, 204, 240 P. 502.

[5] It is next contended by appellant that the court committed prejudicial error by admitting into evidence the testimony of the witnesses Taube and Mrs. Sherman as to the events which transpired after these witnesses, with Mr. Salter and Mr. Sherman, left the latter's home at which place Homotoff remained with Mrs. Whitehouse, with the possible exception, concedes appellant, of Taube's telephone conversation with Homotoff about 9:45 o'clock as hereinbefore narrated. By an appropriate instruction the court admonished the jury that such evidence was not received for the purpose of proving that the defendant herein had knowledge of, committed, or participated in the robbery and kidnapping offenses referred to in such testimony, but solely for the purpose of enabling the jury to determine whether the testimony given by defendant herein at the trial of Homotoff was true or false, and secondly, for the purpose of enabling the court to determine whether such testimony given by defendant herein at Homotoff's trial was in fact material to the issues presented in that case, and for no other purpose. We are unable to perceive how defendant herein was prejudiced by this testimony. It was not admitted to show that she was in any way concerned in the commission of the crimes to which such testimony related, and the jury was so instructed. The challenged testimony was offered only for the twofold purposes indicated. The evidence in question tended to



corroborate the testimony of Mrs. Whitehouse that Homotoff was at the Sherman residence with her from the time Taube, Salter, Mr. and Mrs. Sherman left to seek Mr. Ide and until Taube telephoned Homotoff to depart from the Sherman residence. In that connection it was admissible as an aid to the court in determining the materiality of appellant's testimony at Homotoff's trial and for the further purpose of showing that appellant testified falsely when she swore that Homotoff was with her at that time in a theatre located in the city of Los Angeles. We find nothing in the questioned testimony even intimating the participation by appellant in the depredations that Taube and Salter committed, and consequently appellant was not prejudicially affected thereby.

[6-8] Next appellant insists that the trial court fell into error in the giving of and refusal to give certain instructions. Complaint is made of the refusal of the court to define for the jury certain words used by the appellant in her testimony at her trial for perjury. She requested that the court give to the jury a definition of the words "recollection" and "recall". The action of the court in refusing such instructions was proper for the reasons given by us in our discussion heretofore of the positive testimony she gave at Homotoff's trial concerning his presence with her at a theatre in Los Angeles, and also because the words needed no definition. They are simple words, commonly used and as commonly understood. They have acquired no peculiar or special meaning in law apart from their commonly accepted and understood meaning established by universal usage and custom. Furthermore, what appellant may have "recalled" or "recollected" upon her trial for perjury had no bearing upon the positiveness and directness of the testimony given by her at the trial of Homotoff. Also, for reasons heretofore given, the action of the court in refusing to instruct the jury to the effect that the testimony of Mrs. Whitehouse and Arthur Taube related to the same matter and must be regarded as the testimony of one witness, must be held to be proper. The court correctly instructed the jury that in order to convict appellant of perjury the testimony of two witnesses, or one witness and corroborating circumstances, was required. The jury was advised that a defendant is presumed to be innocent, the doctrine of reasonable doubt was defined

as well as the degree of proof required to satisfy the reason and judgment of those bound to act conscientiously upon the evidence in determining the guilt or innocence of the defendant. Perjury was defined as set forth in section 118 of the Penal Code; an instruction was given that in every crime there must exist a union or joint operation of act and intent; that no statement made by a witness constitutes perjury unless such statement is false and untrue and wilfully made with intent and design to deceive and mislead; that it is immaterial whether or not the statement actually does in fact deceive, but only whether it was testified to wilfully and with deliberate design and intention to deceive and with knowledge that it was in fact false at the time the testimony was given. The jury was further admonished that criminal intent is a vital element in the crime of perjury and if such intent be not proved the defendant is entitled to an acquittal; that if the defendant acted with no guilty intent, or the jury had a reasonable doubt as to such intent, she should be acquitted; that the defendant could not be guilty of perjury if she swore honestly to what she believed to be true, even though she was mistaken. Another instruction advised the jury that if the evidence was susceptible to two constructions, each of which appeared reasonable, one pointing to guilt and the other to innocence, the jury must adopt the latter. The court also instructed the jury that they must be satisfied beyond a reasonable doubt that the defendant swore falsely at Homotoff's trial and that she knew her testimony was false and that unless the jury was so satisfied the defendant was entitled to a verdict of not guilty. The court also instructed the jury that evidence of the defendant's good reputation may be sufficient to create a reasonable doubt in their minds as to her guilt and that if such evidence produced such doubt the jury should acquit her. Appellant's complaint as to the refusal of the court to give certain proffered instructions concerning the element of criminal intent as applied to the crime of perjury and various other requested instructions is aptly answered by the language this court used in the case of *People v. Curtis*, 36 Cal.App.2d 306, at page 322, 98 P.2d 228, at page 235, wherein we said "Appellant challenges the correctness of several other instructions, but when we remember that instructions should not be considered singly, but in their en-

tirety (*People v. Macken*, 32 Cal.App.2d 31, 89 P.2d 173), we have no hesitancy in saying, from a reading of all the instructions, that the jury was clearly, understandingly and unerringly admonished, and must have understood, that before they could find the defendant guilty they must be convinced beyond a reasonable doubt that he knowingly, wilfully, and in violation of his oath testified falsely as to certain matters material to the grand jury's inquisition; that they must base such conviction upon the testimony of two witnesses or of one witness and corroborating circumstances; and must be convinced beyond a reasonable doubt that at the time of the giving of such testimony he knew the same to be false and that he gave such testimony wilfully and for the purpose and with the intent of deceiving and misleading the grand jury. A reading of all the instructions given impresses us that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before appellant could be convicted of perjury. This is all the law requires".

[9-11] Finally appellant urges that the court erred in admitting into evidence the programs received in evidence at the trial of Homotoff. The basis for this contention is that no proper foundation was laid and that such evidence was incompetent, irrelevant, immaterial and hearsay. Nowhere in the record of the trial of appellant for perjury do we find any specifications of the reasons for the objections made to the introduction of the programs in evidence, and for the first time, on appeal, she attempts to show that these exhibits should

not have been received in evidence. Without doubt, as the record discloses, appellant herself offered certain programs in evidence at the trial of Homotoff and that at her trial for perjury it was stipulated that these programs might be received in evidence. Where an objection to evidence is made, as was the case here, in general terms, and where the objection could have been cured by the party offering the testimony if the reason for which it was objected to had been given in the trial court, it is the general rule that an appellate tribunal will not consider such objections to the admission of evidence when the precise ground of objection was not clearly or at all specified in the trial court. Where, as here, the proffered evidence is allegedly imperfect because of the lack of preliminary proof, which might or might not have been supplied by the party offering such evidence, the objection must be specific and it must point out the alleged defect. If this is not done, the objection cannot be urged on appeal. *People v. Owens*, 123 Cal. 482, 490, 56 P. 251; *People v. Wright*, 26 Cal.App.2d 197, 207, 79 P.2d 102; 8 Cal.Jur. pp. 503, 504. Manifestly the programs offered in evidence by the appellant herself at the trial of Homotoff were admissible in evidence at her trial to prove that at the Homotoff trial she testified wilfully and falsely to a matter material to the issues framed and as presented at such trial.

For the foregoing reasons the order denying defendant's motion for a new trial is affirmed.

YORK, P. J., and DORAN, J., concur.

22 Cal.2d 247

**Ex parte BASUINO.**

**Cr. 4479.**

Supreme Court of California.

May 20, 1943.

**1. Criminal law**  $\Rightarrow$ 989

The statement of facts included in arraignment for judgment is "mandatory" on the court as preliminary to pronouncing judgment and constitutes no part of the "judgment" itself. Pen.Code, § 1200.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Mandatory".

**2. Criminal law**  $\Rightarrow$ 1202(6)

In determining what sentence was imposed against accused who was charged with violation of state narcotics law with prior conviction of felony, the record in addition to the judgment of conviction could be considered as supplementing the language of the judgment which did not refer to prior conviction nor state the number of years for which accused was sentenced. St.1935, p. 2207, § 6; Pen. Code, §§ 1200, 1207.

**3. Criminal law**  $\Rightarrow$ 995(2)

A judgment of conviction is required only to state the offense of which defendant was convicted and the penalty imposed and need not repeat anything contained in the papers preceding it in view of fact that they are part of the "record". Pen.Code, § 1207.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

**4. Criminal law**  $\Rightarrow$ 991

The trial court in rendering judgment in criminal case is not required to adjudicate any fact not in issue.

**5. Criminal law**  $\Rightarrow$ 1208(1)

Where judgment of conviction decreed that the defendant be punished by imprisonment in the state penitentiary, that imprisonment should be for term prescribed by law on the record of the facts was necessarily implied.

**6. Criminal law**  $\Rightarrow$ 1202(6)

Record established that judgment of conviction which failed to mention prior conviction of felony and decreed that defendant be punished by imprisonment in state prison but did not state length of term was a judgment of conviction of vio-

lating narcotics act with prior conviction of felony and imposed maximum sentence of ten years. St.1935, p. 2207, § 6; Pen. Code, §§ 1207, 2009, 2023, 2033.

**7. Habeas corpus**  $\Rightarrow$ 30(3)

Where accused was not prejudiced by language used in judgment of conviction insofar as it might be deemed ambiguous, in light of record which established that accused was actually convicted of violating Narcotic Act with prior conviction of felony, carrying maximum ten-year sentence, failure of judgment to mention prior conviction and to state number of years of imprisonment did not invalidate judgment so as to authorize release of accused on habeas corpus before expiration of maximum sentence of ten years provided for such offense. Pen.Code, §§ 1207, 1404; St.1935, p. 2207, § 6.

**8. Criminal law**  $\Rightarrow$ 995(1)

The law does not favor a construction which would result in holding a judgment void or a formal judicial proceeding meaningless.

**9. Criminal law**  $\Rightarrow$ 1202(6)

Where record established that accused was convicted of violating state narcotics act with prior conviction of a felony, the judgment rendered which decreed that accused be punished by imprisonment in state penitentiary was a judgment for a ten-year maximum sentence. St.1935, p. 2207, § 6.

In Bank.

Habeas corpus proceeding by Angelo Basuino to obtain release from Folsom State Prison. After argument on application the petitioner was released on parole to custody of state parole officer.

Writ discharged and petitioner remanded to custody of such officer.

Angelo Basuino in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Mathew Brady, Dist. Atty., and Joseph A. Garry, Asst. Dist. Atty., both of San Francisco, for respondent.

SCHAUER, Justice.

Petitioner seeks his release from the Folsom State Prison upon the ground that his detention there is now illegal in that he has served (counting good conduct credits earned) the maximum (for a first



offender) term for which he was sentenced. The warden of the prison resists the application, and in the course of our consideration of the matter it has been suggested that the entire record of the case, or at least of the proceedings at the time of judgment, may be examined in determining the precise offense for which a defendant is sentenced; that the record in each of the cases here involved discloses that the petitioner was duly charged with the crime of violation of the State Narcotic Act *with prior conviction of a felony*; that the petitioner in each case both admitted the prior conviction of felony and pleaded guilty to the substantive offense as charged, thereby establishing irrefragably his liability to sentence for the offense as aggravated (for term of imprisonment) by the prior conviction; and that the judgment, construed in the light of the record, carries a maximum sentence of ten years, which period has not yet expired. We conclude that, for the reasons indicated above and hereinafter developed more fully, the writ must be discharged.

The law which petitioner was adjudged guilty of violating (State Narcotic Act) provides that (§ 6, Stats. 1929, p. 385, as amended by § 5b, Stats. 1935, p. 2203, at p. 2207): "Any person convicted under this act for transporting \* \* \* any of the drugs \* \* \* mentioned in section 1 of this act, shall upon conviction be punished by imprisonment in the county jail or in the State prison for not less than six months nor more than six years;<sup>1</sup> *provided, however, that any such person convicted under this act for transporting \* \* \* any of the drugs \* \* \* mentioned in section 1 of this act, shall be imprisoned in the State prison for not less than one year nor more than ten years if such person has also been previously convicted of a felony \* \* \* and such previous conviction of a felony is charged in the indictment or information and is found to be true by the jury, upon a jury trial, or is found to be true by the court, upon a court trial, or is admitted by the defendant.*"

The return to the writ does not include copies of the informations or indictments but does contain copies of four documents, identical in every detail except as to the numbers they bear and refer to, each of which documents appears to set forth the designation of the form number, the title

of the trial court, the department number, the date, the name of the trial judge, the title of the cause, its number, the clerk's minutes of the proceedings on the arraignment for judgment, the judgment, and the clerk's minutes as to the commitment. According to the recitals in the clerk's minutes so portrayed, it appears that the petitioner (defendant in each of such proceedings) was present in court and "was duly informed by the Court of the Information duly presented and filed against him on the 1st day of February, 1938, \* \* \* charging said Defendant with the crime of Felony, to wit: *Violating the State Narcotic Act; and one prior conviction of a Felony*; of his arraignment and plea of Not Guilty, on February 8th, 1938; of his admission of having suffered a prior conviction of a Felony; of the Order of Court, on February 25th, 1938, permitting the withdrawal of his former plea of Not Guilty, and of the substitution of his plea of Guilty." Further, according to the minutes so presented, "The Defendant \* \* \* was then asked if he had any legal cause to show why judgment should not be pronounced against him; to which Defendant replied that he had none."

The foregoing recitals evidence an arraignment obviously sufficient to warrant the pronouncement of a judgment carrying the ten-year maximum; i.e., for *violation of the State Narcotic Act with one prior conviction of a felony*, but the judgment itself as actually pronounced was silent as to the prior conviction of felony. According to the record it reads: "And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its Judgment: That whereas, the said Defendant Angelo Basuino having been duly convicted in this Court of the crime of Felony, to wit: *Violating the State Narcotic Act*, It is therefore ordered, adjudged and decreed that the said Defendant Angelo Basuino be punished by imprisonment in the State Prison of the State of California; said sentence to run concurrently with sentence imposed in" the other three causes. Obviously the court could and *should* have sentenced the petitioner for the longer maximum term; i.e., for violating the State Narcotic Act *with prior conviction of a felony*, but equally apparent is the fact that the judgment itself, if we cannot look to the remainder of the record

<sup>1</sup> Emphasis within quotations is added.

to interpret it, refers only to the unaggravated crime of "Violating the State Narcotic Act" and hence would carry a maximum penalty of six years' imprisonment.

The question to be determined is, may the Board of Prison Terms and Paroles (and this court) properly consider the accompanying record as supplementing the language of the judgment, and, in the light of such record, construe it as imposing the sentence which the law ordained? We are of the opinion that the judgment must be so viewed.

[1,2] The historical statement of facts included in an arraignment for judgment is by statute made mandatory on the court as a preliminary to pronouncing judgment (Pen.Code, § 1200; *People v. Walker* (1901), 132 Cal. 137, 140, 64 P. 133; cf. *People v. Swift* (1934), 140 Cal.App. 7, 9, 34 P.2d 1041; *People v. Wademan* (1918), 38 Cal.App. 116, 137, 175 P. 791). Such preliminary statement has been said to constitute no part of the judgment itself (*People v. Murback* (1883), 64 Cal. 369, 372, 30 P. 608; *In re Ring* (1865), 28 Cal. 247, 248, 252, 253) but even though technically it is not a part of the judgment, the judgment is only a part of the proceeding in and by which the respective rights of the State and the defendant are determined. In the case of *Hambrick v. State* (1920), 80 Fla. 672, 86 So. 623, 624, 14 A.L.R. 987, at page 989, the Supreme Court of Florida said: "The entire record may be looked to in ascertaining the offense for which the accused is sentenced, and an erroneous recital or statement of the offense by the court in pronouncing sentence, or of the clerk in recording in the minutes of the proceedings kept by him the judgment imposed, will not vitiate the judgment when the record fully discloses the offense for which the accused was indicted, tried, and convicted. In such case the record furnishes a complete protection against another prosecution for the same offense."

Section 1207 of the Penal Code, as it read at the time the judgments were rendered against petitioner (February 28, 1938) provided that "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if any, and must, within five days, annex

together and file the following papers, which constitute a record of the action:

"1. The indictment or information, and a copy of the minutes of the plea or demurrer or the case as certified to the superior court, and all rulings thereon.

"2. A copy of the judgment."

[3] In the case of *In re Ring*, supra (1865), 28 Cal. 247, 250, the court had before it a somewhat similar problem. The judgment was attacked, on a habeas corpus proceeding, on the ground "that it does not state 'the offense for which the conviction has been had', as required by section four hundred and sixty-two, Criminal Practice Act." The court said (28 Cal. at page 252): "The four hundred and sixty-second section of the Criminal Practice Act requires the Clerk to enter every judgment rendered upon a conviction in the minutes, 'stating briefly the offense for which the conviction has been had', and within five days thereafter annex together and file certain specified papers, 'which shall constitute the record of the action.' \* \* \* That the several papers specified \* \* \* enter into and become a part of the record must not be lost sight of when we come to determine what it is essential that the judgment itself should contain, for where several papers are thus united in chronological order and made one in legal intent, it cannot be claimed that the contents of one should be repeated in another. If they all, taken together, furnish facts sufficient to protect the defendant against another prosecution for the same offense, it cannot with any show of reason be claimed that the record is defective in any matter of substance. From the mere fact that these several papers are taken into and made a part of the record, it is clear that each one was intended merely to tell its own story—or rather, to relate its particular branch of the whole history. Thus the indictment states the jurisdictional facts, the nature of the offense and the facts and circumstances, so far as they are material. The other papers give the history of the trial, including the verdict; and the judgment, which constitutes the last chapter, merely finishes the account by stating [1] of what offense the defendant was finally convicted, and [2] the penalty imposed by the Court. The judgment need not, and it was not intended that it should, repeat anything contained in the papers which precede it, for

in view of the fact that they go into the record and make a part of it, such repetition would be idle and serve no useful purpose."

[4, 5] As to the first of the two functions of the judgment declared in the above quotation, if an information stated more than one offense and the defendant did not plead guilty to all the offenses charged, or if the charge as laid embraced so-called included or lesser offenses and the defendant did not plead guilty to a specific offense, the language of the judgment of conviction might well be all important as the sole means of determining the precise offense of which the defendant was convicted, but in the case before us there was no such uncertainty for the judgment to resolve. The court was not required to adjudicate any fact not in issue. (*People v. Rhodes* (1934), 137 Cal. App. 385, 389, 30 P.2d 1026.) The specific charges of the several informations, coupled with the defendant's admission of the prior conviction and pleas of guilty to the substantive offenses, definitely establish "of what offense the defendant was finally convicted." So far as the second of such functions is concerned, the statement of the "penalty imposed by the Court", the indeterminate sentence law has eliminated the necessity, in cases of the type here involved, for the judgment to state anything more than that the sentence is imprisonment in a specified state prison for the term prescribed by law. (*In re Carlton* (1921), 53 Cal.App. 225, 227, 200 P. 51; *People v. Ure* (1924), 68 Cal. App. 545, 549, 229 P. 987.) The length of the term actually to be served, within the limits of the law, is fixed at a later time by the Board of Prison Terms and Paroles. Such board also may even change the place of imprisonment (formerly covered by section 1202a of the Penal Code, now by sections 2009, 2023 and 2033 of the Penal Code). The judgment pronounced in each of the cases did decree "that the said Defendant \* \* \* be punished by imprisonment in the State Prison" and the remanding order specified that he was to be "taken [by the sheriff] to the Warden of the State Prison at Folsom \* \* \*". That the imprisonment be for the term prescribed by law upon the record of the facts was necessarily implied.

[6] The fact that the Folsom prison was named is consistent with the view that the judgment was predicated on the de-

fendant's prior conviction and carried the ten-year maximum, inasmuch as section 1202a of the Penal Code, as it was cast at the date of the sentence (February 28, 1938), provided that "If the judgment is for imprisonment in the State prison the judgment shall direct that the defendant be taken to the warden of the State Prison at San Quentin; *provided, however, that if the defendant shall have previously been convicted of a felony*, or if the court in the exercise of its discretion shall deem it a proper case so to do, it shall direct that the defendant be taken to the warden of the *State Prison at Folsom*." No suggestion had been made that there existed any ground for designating the prison at Folsom other than the fact of the prior conviction.

The case of *In re Ring*, supra (1865), 28 Cal. 247, 248, has been quoted and followed or cited with approval in numerous cases, including, among others, *Ex parte Williams* (1891), 89 Cal. 421, 426, 427, 26 P. 887; *People v. Terrill* (1901), 133 Cal. 120, 123, 65 P. 303; *La Grange, etc., Co. v. Carter* (1904), 142 Cal. 560, 565, 76 P. 241; *Ex parte Haase* (1907), 5 Cal.App. 541, 545, 90 P. 946; *People v. Camp* (1919), 42 Cal.App. 411, 422, 423, 183 P. 845; see, also, *Ex parte Clark* (1941), 42 Cal.App.2d 574, 577, 109 P.2d 407.

[7] Petitioner does not claim that the language used in the judgment, insofar as it may be deemed ambiguous in the light of the record, has actually prejudiced him in any way. Section 1404 of the Penal Code provides that "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." In *People v. Wheatley* (1891), 88 Cal. 114, 26 P. 95, this court was confronted with a problem somewhat similar to that here involved. With respect to the attack on the judgment it said (at page 119 of 88 Cal., at page 96 of 26 P.): "It is contended that the court had no right to pronounce judgment of imprisonment for eight years, because 'there is not a word said in the judgment about any prior convictions, nor does the verdict say aught concerning the same.' But the judgment recites that, when the defendant was called up to be sentenced, he was duly informed by the court of the information, charging him



'with the crime of burglary and prior conviction of burglary in the first degree; of his arraignment and plea of not guilty as charged in said information, and guilty of said prior conviction; of his trial, and the verdict of the jury, on the 17th day of October, 1889, "guilty" of burglary in the second degree. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him.' This was sufficient to meet the requirements of sections 1200 and 1207 of the Penal Code; and imprisonment for the term of eight years was authorized."

[8,9] The law does not favor a construction which would result in holding a judgment void or a formal judicial proceeding meaningless. There was in the cases out of which this application has arisen no area whatsoever for the exercise of judicial discretion in determining the sentence to be imposed. The proceedings before the trial court established the defendant's guilt of the precise crime as charged in each case; the law fixed the term of the sentence so far as minimum and maximum period of imprisonment was concerned. If the trial judge, upon such records, had undertaken to sentence the defendant to death or to imprisonment in the county jail, such judgment obviously would be void on the face of the record. Less obvious in character, perhaps, but no less unauthorized in law, would be a judgment that the defendant be imprisoned for not more than six years. In the case of *People v. Vaile* (1935), 2 Cal.2d 441, 42 P.2d 321, a question was raised as to the meaning of a judgment which had been rendered. This court referred to its decision in *In re Boatwright* (1932), 216 Cal. 677, 15 P.2d 755, and said (at page 445 of 2 Cal.2d, at page 322 of 42 P.2d): "As stated in the foregoing opinion, under the indictment, plea, verdict, and commitment, the only term of imprisonment permissible under the law was imprisonment for life without parole. \* \* \* Under such circumstances, the indeterminate sentence provisions of section 1168 of the Penal Code are inapplicable. The law itself has set a sole, definite, and unchangeable period of imprisonment; therefore, when the court sentenced the defendant, *it was of necessity for this period.*" The conclu-

sion of the court in that case is applicable here: upon the record presented, and under the law, the judgment rendered was of necessity for the ten-year maximum.

Petitioner has cited to us the cases of *People v. Noland* (1939), 30 Cal.App.2d 386, 86 P.2d 363, and *People v. Schneider* (1939), 36 Cal.App.2d 292, 98 P.2d 215. In those cases it was stated in substance that in pronouncing judgment the trial court "ignored entirely" or was "silent upon" the matter of a prior conviction and hence that the judgments must be construed as imposing sentences for a first offense only.

It does not appear that the District Court of Appeal in either of those cases was dealing with a record similar to that now before us. In the *Schneider* case the defendant denied the prior convictions charged and the verdict went against him; in the *Noland* case the prior was admitted. But in neither case does the reporter's transcript or the clerk's transcript show what actually occurred at the arraignment for judgment. As to this part of the proceedings the transcripts are identical in each case. The reporter's "transcript" contains merely a statement of his unauthorized conclusion that "the clerk arraigned the defendant for judgment" and the clerk's transcript adds nothing more pertinent than the declaration that the defendant "was duly arraigned for judgment." No copy of minutes showing entries in compliance with the provisions of section 1207 of the Penal Code appears. Thus it may not be said that such decisions (*People v. Schneider*, *supra*; *People v. Noland*, *supra*) actually conflict with the conclusions we have expressed; the drawing of implications from the language there used, contrary to our conclusions, as the petitioner here has sought to do, is disapproved.

Since the argument on the application herein the petitioner has been released on parole to the custody of the State Parole Officer. The writ is discharged, and the petitioner is remanded to the custody of such officer.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

**BETHLEHEM STEEL CO. v. INDUSTRIAL  
ACCIDENT COMMISSION et al.\***

**S. F. 16874.**

Supreme Court of California.

June 14, 1943.

Rehearing Granted July 12, 1943.

**1. Workmen's compensation ⇨1674**

Evidence as to employer's "serious and willful misconduct" in violating safety order by failing to secure steel beams loaded on truck against displacement supported award of increased compensation for death of employee killed when beams fell from truck while employee was riding thereon. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Wilful Misconduct".

**2. Workmen's compensation ⇨1376**

In proceeding for increased compensation for death of employee killed when steel beams fell from truck, inference arose that load on truck was not secured against displacement, as required by safety order, from fact that beams fell from truck. St. 1937, p. 281, § 4553.

**3. Workmen's compensation ⇨941**

Not every violation of a statute is "serious and willful misconduct" which will make employer liable for increased compensation, but a deliberate breach of law framed in interests of working man amounts to "serious misconduct". St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious Misconduct".

**4. Workmen's compensation ⇨939**

The test of whether employer was guilty of "serious and willful misconduct" so as to be liable for increased compensation is whether he knowingly or willfully committed an act that he knew or should have known was likely to cause harm to employee. St.1937, p. 281, § 4553.

**5. Workmen's compensation ⇨941**

That foreman thought that load on truck was properly secured against displacement in accordance with safety order was no defense to employer's liability for increased compensation, where steel beams fell from truck and killed employee riding thereon. St. 1937, p. 281, § 4553.

**6. Workmen's compensation ⇨939**

An employer who permits employee to work under dangerous conditions capable

\* Subsequent opinion 145 P.2d 583.

of being guarded against is liable for increased compensation, notwithstanding that employer did not believe conditions were dangerous. St.1937, p. 281, § 4553.

**7. Workmen's compensation ⇨1723, 1939**

Whether serious and willful misconduct of employer caused employee's injury so as to authorize award of increased compensation is essentially a "question of fact", and Industrial Accident Commission's determination thereof will not be disturbed if it has any evidentiary support. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

**8. Workmen's compensation ⇨945**

An employee's willful misconduct in violating employer's rule by riding on loaded truck would not bar recovery of increased compensation where injuries sustained when steel beams fell from truck resulted in death and were caused by employer's serious and willful misconduct in failing to comply with safety order by securing beams against displacement, and especially where there was evidence that employer's rule was not always enforced. St.1937, p. 280, § 4551; p. 281, § 4553.

**9. Workmen's compensation ⇨941**

A foreman who had duty to carry out safety order requiring that load on truck be secured against displacement was an "executive, managing officer, or general superintendent" of corporate employer within provision for increased compensation, where employee is injured by serious and willful misconduct of such person. St. 1937, p. 281, § 4553(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Executive, Managing Officer or General Superintendent".

In Bank.

Proceeding to review an order of the Industrial Accident Commission awarding damages for death. Award affirmed.

Proceeding by the Bethlehem Steel Company for a writ of review to annul an award of compensation under the Workmen's Compensation Act by the Industrial Accident Commission to Kenneth E. Brinkley, a minor, and others for the death of Charles W. Brinkley, petitioner's employee.

Award affirmed.

For prior opinion, see 54 Cal.App.2d 585, 129 P.2d 718.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten, Dan Murphy, Jr., and Albert Picard, all of San Francisco, for respondents.

CARTER, Justice.

The Industrial Accident Commission made an award of increased compensation to the dependents of Charles W. Brinkley for his death on the ground that it was caused by the serious and wilful misconduct of Brinkley's employer Bethlehem Steel Company, a corporation. The death occurred during and arose out of the course of Brinkley's employment. The employer now petitions to have the award annulled.

The Industrial Accident Commission found that petitioner was guilty of serious and wilful misconduct through its executive, managing officers and general superintendents, in that it had knowingly and wilfully violated a safety order of the commission reading as follows: "Transportation by Trucks. (d) Workmen shall not ride on top of loads that may shift, topple over, or become unstable. (e) All loads shall be *secured against displacement.*" (Emphasis added.)

Petitioner's main contention is that the evidence is insufficient to support the foregoing finding.

On December 31, 1940, Brinkley, a structural steel worker, was working with a crew loading, hauling and unloading steel beams. The general work in progress was the dismantling of a building. The steel was removed from the building, loaded on trucks where removed and hauled to a storage area varying in distance depending on the point of loading. The particular haul in question involved a distance of 100 to 150 feet. The trucks traveled upon a construction road which was rough and uneven, being "full of depressions and chuck holes." The truck which was used for the hauling had a flat bed and no side stakes. The steel beams were I shaped, with dimensions of about 3 feet deep, 10 inches wide at the flanges and 30 feet long. They each weighed 3,200 to 3,500 pounds. At the time Brinkley suffered the fatal injury, several beams had been loaded on the truck. The evidence as to the number varies between six and nine. All except two of the beams were placed on the bed of the truck, resting on the flange side. Two beams

were laid on top of the others, resting on their flat side.

Brinkley and his fellow worker, Black, remained on the truck after it was loaded to ride to the storage area and then assist in the unloading. After the truck had proceeded a short distance at a slow speed, it apparently struck a hole or a rough spot in the road, four beams fell from the truck on the right side on which Brinkley was riding and one on the left where Black was riding. The beams crushed Brinkley, fatally injuring him. There were no chains, ropes or cables securing the beams and they were not fastened to the bed of the truck.

[1,2] The commission was fully justified in finding that subdivision (e) of the safety order, that loads must be secured against displacement, was violated. It may well have inferred that if chains, cables or similar devices had been used the beams would not have fallen from the truck and that security against displacement required the use of some device of that character. Indeed an inference would arise that the load was not secured against displacement from the very fact that the beams did fall from the truck under the circumstances. In *Newkirk v. Los Angeles Junction R. Co.*, 21 Cal.2d 308, 131 P.2d 535, this court held that an inference of the violation of a safety measure of the Safety Appliance Act, 45 U.S.C.A. § 11, requiring efficient hand brakes may arise from the failure of the brake to operate properly when used in the customary and usual manner.

Petitioner refers to evidence indicating that the placing of the two beams on top of the others interlocked them by means of their flanges and made the load secure. If there were seven standing beams with a 10-inch width, the flange of the beam resting on top of four of the standing beams could not interlock that group on one side. Even if there were six standing beams, the two groups of three would not have been interlocked. If the edge of the flange of the top beams rested on top of the standing beams rather than extending down the side only, the weight would tend to secure the beams. Goucher, the foreman of the crew with which Brinkley was working testified: "Q. Now as you have drawn this there is no tieup of any kind or character whatsoever between the three girders standing up or the one on top of the right side of the truck and three girders standing on the left hand side of the truck? A. I don't think there was. Q. Were the



two top girders in any way connected together? A. No." There is also evidence that 75 to 100 loads of seven beams each had been hauled without casualty. That did nothing more than create a conflict in the evidence which was resolved against petitioner.

[3,4] The part played by the employer's violation of a safety order or rule of the commission in the determination of whether or not he is guilty of serious and wilful misconduct, was stated recently by this court in *Parkhurst v. Industrial Acc. Comm.*, 20 Cal.2d 826, 830, 129 P.2d 113, 115, in commenting on the employer's violation of a law: "It is true that not every violation of a statute is serious and wilful misconduct \* \* \* 'Where there is a deliberate breach of a law \* \* \*, which is framed in the interests of the working man, it will be held that such a breach \* \* \* amounts to serious misconduct.'" And again at page 830 of 20 Cal.2d, at page 115 of 129 P.2d, that: "The test under these cases is whether the employer knowingly or willfully committed an act that he knew or should have known was likely to cause harm to his employee."

The above rules viewed in the light of the facts in this case justified the commission's finding of serious and wilful misconduct on the employer's part. We have seen that the evidence was sufficient to establish a violation of the safety order. Petitioner's superintendent Scanland and the foreman on the work in which Brinkley was engaged knew of the safety order. The road over which the truck hauled the beams was rough, hence a load not properly secured was likely to shift. Loads were secured by chains or ropes on occasions. Goucher, the foreman testified:

"Q. Were there some of the loads you took out of there you did tie down with chains? A. Yes.

"Q. And there were chains and ropes there which you used whenever necessary? A. Yes, they had them on the premises, plenty of them."

Scanland testified:

"Q. Were those girders fastened to the truck in any way? A. I don't think they were. No, I saw no indication that \* \* \* I saw the load after it was off, but I saw no indication of it having been fastened.

"Q. Aren't there safety measures that require that girders of that type be fastened to the truck? A. Yes, there is.

"Q. Then the safety regulations were not being complied with? A. Well, this safety applies to moving loads on highways, as I understand it."

No device or method was used to secure the load except the arrangement of the beams, which we have seen probably would not keep one or the other groups of standing beams from shifting. There were chains available for securing loads. Scanland when asked whether compliance with the safety regulations had been had, replied: "Well, this safety applies to moving loads on highways, as I understand it." The clear implication is that the order was knowingly not observed in the instant case. Applying the foregoing test the commission was justified in concluding that the employer knowingly wilfully committed an act that he knew or should have known was likely to cause harm to the employee. In *Ethel D. Co. v. Industrial Acc. Comm.*, 219 Cal. 699, 28 P.2d 919, the safety order required the maintenance of secure handholds on a ladder from which the employee fell. There was grease on the platform from which the employee was descending. This court said at page 704 of 219 Cal., at page 921 of 28 P.2d: "It may be conceded that, generally speaking, the mere failure of an employer to comply literally with the requirement of a safety order of the Industrial Accident Commission does not of itself justify a finding that the employer is guilty of serious and wilful misconduct. *In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act may properly be characterized as 'serious and wilful misconduct.'* What would amount to no more than simple negligence in one situation may well be denominated serious and wilful misconduct in another. \* \* \* In the instant case the continued presence upon and about the derrick of so slippery a substance as crude oil would seem to point unmistakably to the necessity of strict compliance with the provisions of the commission's Safety Order 1618 and to suggest to the person in charge of the oil well that a ladder utilized by workmen should be provided with secure handholds rather than with such makeshift supports as the end of a bolt or an upright post supporting a railing. At all events, *the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to*

*jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to whom the evidence in the case was submitted."* (Emphasis added.)

[5,6] There is evidence that Goucher thought the load was properly secured against displacement. The rule on that subject is stated in *Hatheway v. Industrial Acc. Comm.*, 13 Cal.2d 377, 381, 90 P.2d 68, 70: "The cases are quite uniform to the effect that permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of the employees that the commission's finding that such conduct is serious and wilful will not be disturbed. The mere fact the employer did not believe the condition was dangerous does not relieve him from liability. Thus in *Blue Diamond Plaster Co. v. Industrial Acc. Comm.*, 188 Cal. 403, 409, 205 P. 678, 681, the employee was killed as a result of the failure of the employer to place guards on machinery. The managing agents of the employer testified that they knew of the condition, but stated that they did not consider the condition unsafe. 'Their mistake in judgment upon that subject cannot be held to relieve their employer from liability.'"

[7] Finally, it must be remembered that whether serious and wilful misconduct of the employer caused the employee's injury is essentially one of fact and the commission's determination will not be disturbed if it has any evidentiary support. *Parkhurst v. Industrial Acc. Comm.*, supra.

[8] The employer had a rule which forbid its employees to ride upon the loaded trucks. Brinkley was riding upon the truck when he was injured. However, even if it be assumed that he was knowingly violating that rule at the time of the accident, and that such constituted wilful misconduct, it is no defense in this proceeding. Section 4551 of the Labor Code, St.1937, p. 280, provides:

"Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half, except:

"(a) *Where the injury results in death.*

"(b) \* \* \*

"(c) Where the injury is caused by the failure of the employer to comply with any

provision of law, or any safety order of the commission, with reference to the safety of places of employment." (Emphasis added.)

The serious and wilful misconduct of the employee is not a defense to a claim for ordinary compensation if the injury occurring by reason of the misconduct of the employee resulted in his death. *Western Pac. R. Co. v. Industrial Acc. Comm.*, 193 Cal. 413, 224 P. 754. It must also be true that it is not a defense when the claim is for additional compensation by reason of the serious and wilful misconduct of the employer. In the instant case the injuries suffered by Brinkley arose out of and occurred in the course of his employment and his death resulted. The commission's finding that the employee was injured by reason of the serious and wilful misconduct of the employer, is supported by the evidence. Furthermore, it should be observed that the rule against riding the loads was not always enforced. Although there is sharply conflicting evidence on that subject, Black, Brinkley's fellow employee testified:

"Q. Mr. Black, were you and Mr. Brinkley riding this load the same way you had done on previous occasions? A. Yes.

"Q. And you have never been told not to ride the load that was not a shaky load? A. Well, you see some of these loads we had loaded up we put ropes and we put chains on some of them and Mr. Goucher had told us to be careful of the shaky loads. I heard him say that, and this being an apparently safe load there was no mention of this particular load.

"Q. And there was no mention not to ride loads of this kind? A. Not that I can recall.

"Q. Hadn't Mr. Goucher taken men off of these loads before when he found them riding? A. I could not say, he had never taken me off before.

"Q. Do you know if Mr. Goucher had ever seen you riding this type of load and he did not speak to you? A. He probably has.

"Q. Do you know whether he ever saw you riding this type of load? A. Sure.  
\* \* \*

"Q. Do you know whether he ever saw you riding there? \* \* \*

"Q. After the load was complete? A. Yes.

"Q. And the driver started to go? A. Yes.

"Q. When did he do that, can you give us any time? A. No.

"Q. No time at all? A. No, but it happened a number of times.

"Q. You think it happened a number of times that he saw you? A. Sure."

Under these circumstances the injury was the result of the failure to secure the beams against displacement, rather than the riding of the load. The case of *Guy F. Atkinson Co. v. Industrial Acc. Comm.*, 38 Cal.App.2d 366, 101 P.2d 156, is clearly distinguishable. There the main basis of the decision was that none of the persons mentioned in section 4553(c), St.1937, p. 281 (managing officers, etc.) knew that a guard had not been installed, and if the employee killed were a person in that class, his death resulted solely from his failure to install the guard. In *Folsom v. Industrial Acc. Comm.*, 3 Cal.App.2d 282, 38 P.2d 786, the court merely affirmed the commission's finding that the employee's conduct was the cause of the injury.

[9] Petitioner contends that, it being a corporation, there was no serious and wilful misconduct on the part of the persons mentioned in section 4553 of the Labor Code. That section reads: "The amount of compensation \* \* \* shall be increased \* \* \* where the employee is injured by reason of the serious and wilful misconduct of any of the following: (a) \* \* \* (b) \* \* \* (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof." The evidence shows that Scanland was the employee's superintendent for dismantling the buildings; that Goucher was its foreman under Scanland who was in full charge of the loading and unloading crew of which Brinkley was a member; that Scanland and Goucher knew of the safety order; that chains were available to Goucher. Scanland testified that the duty with respect to whether the loads were safe rested upon Goucher. And further:

"Q. Was there anybody present that was supposed to carry out orders of safety regulations? A. The subforeman, Mr. Goucher."

Under these circumstances the commission was justified in determining that Goucher was one of the persons within the meaning and intent of section 4553(c) of the Labor Code. See *Gordon v. Industrial Acc. Comm.*, 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374; *First Nat. Pictures, Inc., v. Industrial Acc. Comm.*, 87 Cal.App. 537,

262 P. 38; *Church, etc., v. Industrial Acc. Comm.*, 86 Cal.App. 182, 260 P. 578. Petitioner relies upon *Green v. Industrial Acc. Comm.*, 130 Cal.App. 337, 19 P.2d 1029, but in that case the court concluded that the facts supported the determination of the commission that there was no misconduct on the part of the persons specified, and further, the person involved was not charged with the duty of requiring compliance with safety regulations. The latter comment is likewise applicable to *Guy F. Atkinson Co. v. Industrial Acc. Comm.*, supra.

The award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.



59 Cal.App.2d 113

**REMMERS v. CICILLOT et al.**

Civ. 13836.

District Court of Appeal, Second District,  
Division 3, California.

June 9, 1943.

Rehearing Denied June 30, 1943.

Hearing Denied Aug. 5, 1943.

#### 1. Specific performance ⇐123

In action for specific performance of contract for exchange of real property, where the issues were whether the contract was just and reasonable to defendants whether consideration to be received by them was adequate, and whether defendants' consent had been obtained by fraud, findings that plaintiff sought to acquire defendants' property for resale, and that plaintiff had suffered no damage by reason of defendants' refusal to consummate contract, were insufficient to sustain judgment for defendants.

#### 2. Specific performance ⇐114(2)

In action for specific performance of contract for the exchange of real property, complaint should have alleged that contract was just and reasonable and the consideration adequate. Civ.Code, § 3391.

#### 3. Pleading ⇐403(5)

Failure of complaint seeking specific performance of contract for exchange of real property to allege that contract was



just and reasonable and the consideration adequate was cured by allegations of answer putting in issue justness of contract and adequacy of consideration passing to defendants. Civ.Code, § 3391.

**4. Appeal and error** ⇐1071(6)

Failure of plaintiff in action for specific performance of contract for exchange of real property to prove fairness of contract and adequacy of consideration passing to defendants would have warranted finding on such issue in favor of defendants, but where no such finding was made, judgment for defendants could not be affirmed on appeal, where findings made did not dispose of issues and there was not an entire absence of evidence that the contract was just and reasonable, and the consideration adequate.

**5. Specific performance** ⇐123

In an action for specific performance of contract for exchange of real property, it was not necessary that court make a finding as to fraud alleged by defendants if the other findings were sufficient to support the judgment for defendants.

**6. Specific performance** ⇐119

Plaintiff's right to a decree of specific performance for exchange of real property does not depend upon ability to show that plaintiff suffered monetary damage by reason of defendants' refusal to consummate contract.

**7. Specific performance** ⇐119

The presumption is that breach of contract to convey real property cannot be compensated by allowance of damages, and that one who contracts to acquire real property has not an adequate remedy at law in the event of a breach of the contract by the seller. Civ.Code, § 3387.

**8. Specific performance** ⇐64

Plaintiff's right to recover any damages sustained by reason of defendants' breach of contract for exchange of real property, or fact that plaintiff suffered no monetary damage would not defeat her right to specific performance. Civ.Code, § 3387.

**9. Specific performance** ⇐123

In action for specific performance of contract for exchange of real property, judgment awarding defendants the sum of \$100 cash which they had paid to plaintiff's agent was erroneous, where there was no finding of facts which entitled

defendants to rescind though there was a finding that defendants had rescinded.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Rosa T. Remmers against Joe Ciciliot and Dolores Ciciliot for specific performance of an agreement for the exchange of real property. From a judgment for defendants, the plaintiff appeals.

Reversed.

Clark and Morgan, of Alhambra, for appellant.

John Henderson Pelletier, of Los Angeles, for respondents.

SHINN, Justice.

Plaintiff and defendants entered into a written agreement for the exchange of real property, that of plaintiff consisting of a small business property in Monrovia, that of defendants a 5-room residence in Pomona. Plaintiff's property was subject to a \$2,500 trust deed, defendants' was clear, and defendants were to pay plaintiff \$100 in cash. They opened an escrow with a bank as escrow holder and signed escrow instructions which were of themselves a complete agreement for the exchange. Before the escrow was closed defendants attempted to rescind the agreement and gave notice that they did rescind upon the claim that plaintiff's property had been misrepresented to them.

Plaintiff sued for specific performance; defendants answered, admitting the execution of the agreement and alleging that they had been induced to enter into it by certain fraudulent representations, as follows: that plaintiff's property had cost her \$6,000 and was of the market value of that amount; that plaintiff's property had been leased to one S. J. Volturo for five years at a rental of \$40 a month for the first year, \$45 a month for the second year, and \$50 a month for the remainder of the term, and that said Volturo was financially responsible, whereas the property was not worth more than \$3,000 and Volturo was financially irresponsible and was acting only as the agent and dummy for plaintiff and posing as her lessee in order to enable her to dispose of the property. It was also alleged that the exchange of properties was "unjust, unfair, unreasonable and inadequate," and that said properties were not of equal value and that

defendants would have received an inadequate consideration under said exchange.

Following trial of these issues the court made findings, concluded therefrom that plaintiff had no cause of action for specific performance, and entered judgment for defendants.

We are unable to discover in the findings any basis for the judgment. After reciting the making of the agreement and defendants' effort to rescind, the findings read as follows: "VI. That in entering into the agreement described in paragraph I hereof, plaintiff was seeking to acquire the Pomona property for purposes of resale only and as a purely business and speculative venture, and not for the purpose, or with the intent, of using said Pomona property as a home or in any way having intangible value not compensable in money."

"VII. That plaintiff has suffered no damage as a result of the failure of consummation of the agreement described in paragraph I hereof or as a result of defendants' refusal to consummate said agreement; that if plaintiff had suffered any damage for any such reason, and if she had any cause of action against defendants or either of them for any such damage, she would have an adequate remedy at law, and that any such damage could be fully compensated by money."

[1] The controlling issues in the case were whether the contract was just and reasonable as to the defendants and the consideration to be received by defendants in the exchange adequate, and whether defendants' consent to the contract had been obtained by fraud of the plaintiff entitling them to rescind. The findings are not sufficient to dispose of either of these issues.

[2,3] The complaint did not allege facts to show that the contract was just and reasonable and the consideration adequate, as it should have done. Civil Code, § 3391; *George v. Weston*, 1938, 26 Cal. App.2d 256, 261, 79 P.2d 110; *Walker v. Clark*, 1926, 80 Cal.App. 520, 523, 252 P. 334; *Williams v. Foss*, 1924, 69 Cal.App. 705, 707, 231 P. 766; *Joyce v. Tomasini*, 1914, 168 Cal. 234, 237, 142 P. 67. However, no demurrer was filed and no objection was made at the trial to the sufficiency of the complaint. Moreover, the deficiencies of the complaint were supplied by the affirmative allegations of the answer, which

put in issue the justness of the contract and the adequacy of the consideration passing to defendants under the contract. These affirmative allegations were deemed to have been controverted by plaintiff, § 462, Code of Civ.Proc., and the trial proceeded apparently upon the theory that the pleadings were sufficient to allow the admission of evidence upon those issues; at least no objection was made that the pleadings were insufficient. The record is practically destitute of evidence as to the fairness of the contract or the adequacy of the consideration, but what little evidence is found in the record is in plaintiff's favor. There was conflicting evidence as to the alleged representation as to value but no evidence as to the falsity of the representation. There was also testimony as to representation of responsibility and some evidence tending to show financial irresponsibility upon the part of Volturo, but discussion of this evidence is unnecessary because there was no finding as to the truth of the charges of fraud.

[4] Since it was the duty of plaintiff to prove the fairness of the contract and the adequacy of the consideration passing to defendants, in the absence of any evidence on those issues the court would have been warranted in making findings thereon in favor of defendants (*Glassell v. City of Los Angeles*, 1930, 106 Cal.App. 395, 407, 291 P. 227; *Kohner v. National Surety Co.*, 1930, 105 Cal.App. 430, 439, 440, 287 P. 510), and if there were such findings they would furnish support for the judgment.

We cannot find in this rule support for the judgment. There was no specific finding on the issue of fairness or adequacy of consideration, but finding No. VII, which we have quoted, does, by inference, determine those issues in favor of plaintiff. The finding obviously was not intended to be a specific finding on the issues in question but it is sufficient to indicate that the trial court was of the opinion that the contract was fair and the consideration adequate.

The question of the fairness of the contract was no broader in this case than the question of adequacy of consideration. The defendants had nothing to do except to convey their property for a given consideration and enter into possession of the property which they were acquiring. If they were to receive full value for what they parted with there would have been

no basis for a claim that the exchange was not just and reasonable.

The finding to the effect that plaintiff suffered no damage from defendants' refusal to consummate the exchange undoubtedly was intended to be a finding that plaintiff's property had a value at least equal to that of defendants' property. In summing up the case at the conclusion of the trial, the court said, in part, as follows: "\* \* \* the evidence not only fails to show that the plaintiff has been damaged, but rather tends to show to the contrary. \* \* \* So it appears here from the evidence that what she was to receive was certainly not worth any more than the property that she was to give; and the weight of the evidence would seem to indicate that her own property was worth more than the other. So that, rather than being damaged by this breach of agreement to buy, she has been benefited by it." It is true that there was very little evidence which touched upon the questions of value and the justness and reasonableness of the contract, but it was not entirely lacking. The witness Sigler, a real estate broker who was representing defendants in the exchange, in answer to the questions by the court, testified as follows: "Q. Did Mr. or Mrs. Ciciliot ever ask for your opinion concerning the values of either of these pieces of property? A. They simply put it in this way—after the escrow they said—after we came out of the bank, Mr. Ciciliot said: 'Well, do you think I made a good deal?' Q. That was after the escrow? A. Yes. And I said: 'I think you did, in view of the fact that you are getting something you wanted—a bakery, and you have been trying for some time to acquire something of that sort.' Q. That was your honest opinion at that time? A. That is at the present time, too, yes, sir—considering, of course, that he is a baker, and that was a bakery shop. The Court: That is all." This testimony was perhaps supplemented to some extent by photographs of the properties which the respective parties introduced in evidence and by their descriptions as given by the witnesses. But the opinion thus expressed, admitted without objection, and in the absence of any contradictory evidence, appears to have persuaded the trial court that the contract was one which would not have resulted in any advantage to plaintiff. That the court was so persuaded is evidenced by the remarks which we have quoted, which cer-

tainly indicate that if more specific findings had been made on these issues they would have been favorable to plaintiff. Significant also is the fact that defendants, evidently believing that the burden was upon them to prove that the consideration was inadequate, that is to say, that plaintiff's property was worth less than she had represented, made no effort to do so.

We are not intimating that the findings were sufficient to have supported a judgment for plaintiff. That is not the question. Here we have a judgment for defendants. The question is whether we should affirm it because of the rule that the court would have been justified in finding in favor of defendants upon the issues of reasonableness and adequacy of consideration if plaintiff failed to sustain the burden of proof. This rule does not apply because the court made no such finding. Should we affirm the judgment in the absence of a finding upon those issues, on the theory that had a finding been made it would necessarily have been in favor of defendants? We have shown that this cannot be done. Our quotations from the record show that it is not true that there was an entire absence of evidence that the contract was just and reasonable and the consideration adequate. And finding No. VII, together with the quoted remarks of the trial judge, preclude us from saying that had more specific findings been made they would necessarily have been in defendants' favor. It is quite evident, as we have said, that they would probably have been in plaintiff's favor. It necessarily follows that the judgment for the defendants cannot stand in the absence of a finding that the contract was not just and reasonable or that the consideration was inadequate (especially in view of finding No. VII), unless there is some other finding to support it.

[5-8] We have alluded to the fact that there was no finding made upon the defense of fraud but we do not undertake to account for this omission. The record discloses that plaintiff's counsel requested a finding upon the allegations of fraud. We also find in the court's summary of the evidence the following: "Certainly it is true, as Mr. Clark has said, that so far as the representations of the value of the property are concerned, the evidence does not support a finding that that representation was false; \* \* \*." It was not necessary that the court make a finding as



to the alleged fraud if the findings were otherwise sufficient, but this and other omissions fasten our attention on the findings which we have already quoted, which are, in substance, that plaintiff was seeking to acquire defendants' property for resale and as a purely business and speculative venture and not to use it as a home; that plaintiff suffered no damage by defendants' breach of the agreement, and that if she had suffered any damage she would have an adequate remedy at law by way of compensating damages. These findings are beside the issue. Plaintiff's right to a decree of specific performance does not depend upon her ability to show that she has suffered monetary damage by reason of the breach of the agreement. The law is that it is presumed that the breach of an agreement to convey real property cannot be compensated by the allowance of damages, and that one who contracts to acquire real property has not an adequate remedy at law in the event of a breach of the contract by the seller. Civil Code, § 3387. This is a codification of the equity rule, which is stated by Mr. Pomeroy as follows: "Whenever a contract concerning real property is in its nature and incidents entirely unobjectionable,—when it possesses none of those features which, in ordinary language, influence the discretion of the court,—it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach." Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 4, § 1402. "The jurisdiction to enforce performance of contracts specifically is exclusive, for the remedy itself is most distinctively equitable and completely beyond the judicial methods of the law courts; \* \* \*. The doctrine is fundamental that this jurisdiction will be called into operation, and the specific performance will be decreed only in those classes of cases in which, according to the views taken by the equity court, the legal remedy of compensatory damages, is from its essential nature, insufficient, and fails to do complete justice between the litigant parties. It is true that in applying this doctrine the courts of equity have established the further rule that in general the legal remedy of damages is inadequate in all agreements for the sale or letting of land, or of any estate therein; and therefore in such class of contracts the jurisdiction is always exercised, and a specific performance granted,

unless prevented by other and independent equitable considerations which directly affect the remedial right of the complaining party; but this result does not interfere with nor modify the principle which is under discussion." Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 1, § 221.

"Where land, or any estate or interest in land, is the subject matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case. \* \* \* Equity adopts this principle, not because the land is fertile, or rich in minerals, but because it is land, a favorite and favored subject in England and every country of Anglo-Saxon origin. Land is assumed to have a peculiar value, so as to give an equity for specific performance, without reference to its quality or quantity." 58 C.J. 1024, 1025. These principles have long been accepted in California as the law on the subject. *Wheat v. Thomas*, 1930, 209 Cal. 306, 317, 287 P. 102; *Fleishman v. Woods*, 1901, 135 Cal. 256, 261, 67 P. 276; *Glock v. Howard & Wilson Colony Co.*, 1898, 123 Cal. 1, 6, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17. Plaintiff's right to recover any damages she may have sustained by reason of defendants' breach of the contract or the fact that she may have suffered no monetary damage would not defeat her right to specific performance.

If the court had found the contract to be just and reasonable and the consideration adequate and that defendants' consent to the exchange had been given freely, plaintiff would have been entitled to a decree of specific performance. Those are the questions of fact upon which the rights of the parties depend and they have not been adjudicated.

[9] By the judgment defendants were awarded the sum of \$100 which they had paid to plaintiff's agent. They were not entitled to the return of their money unless they had made a valid rescission. Although there was a finding that they had rescinded, there was no finding of facts which would have entitled them to rescind and the judgment in this respect also is unsupported by the findings.

The judgment is reversed.

DESMOND, P. J., and SHAW, J. pro tem., concur.

**PEOPLE v. HUDGINS.****Cr. 1827.**District Court of Appeal, Third District,  
California.

June 12, 1943.

Hearing Denied July 8, 1943.

**1. Criminal law** ⇨94

Prosecution for violating statute making it unlawful for one under influence of liquor to drive vehicle on highway, was outside jurisdiction of justice court and was within superior court's jurisdiction where the information charged that accused had suffered prior conviction of same offense. Vehicle Code, § 502, St. 1935, p. 174; Pen. Code, § 1425.

**2. Criminal law** ⇨1202(4)

Provision of Penal Code relating to second offenders requires trial court at time of entering plea of accused to interrogate him regarding prior conviction charged by information. Pen. Code, § 1025.

**3. Criminal law** ⇨1202(4)

The provision of Penal Code regarding procedure to be followed in case of prosecution of an accused as a second offender does not apply where the fact of former conviction is an integral part of the offense concerning which the accused is brought to trial. Pen. Code, § 1025.

**4. Criminal law** ⇨1202(4)

A prior conviction for violating provision of Vehicle Code making it unlawful for one under influence of liquor to drive vehicle on highway was not an essential element for consideration in trial of accused who was charged with subsequent violation of the statute, and the prosecution was subject to provisions of Penal Code regarding procedure to be followed in case accused is charged as a second offender. Vehicle Code, § 502, St. 1935, p. 174, Pen. Code, § 1025.

**5. Criminal law** ⇨1202(4)

Where accused was charged with violating statute making it unlawful for one under influence of liquor to drive vehicle on highway and admitted charge that he had been previously convicted of same offense, subsequent reference to the prior conviction by the clerk of court in reading information, and by the prosecution and the

trial court, was prejudicial error. Vehicle Code, § 502, St. 1935, p. 174; Pen. Code, § 1025.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Hallie Harold Hudgins was convicted of driving a vehicle on highway while under influence of intoxicating liquor, and he appeals.

Reversed.

Manwell & Manwell, of Marysville, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

Defendant was charged by an information and convicted upon a jury trial of a violation of Section 502 of the California Vehicle Code, St. 1935, p. 174. That section makes it unlawful for one under the influence of intoxicating liquor to drive a vehicle upon any highway. This same section of the code provides for increased punishment in the event of a subsequent violation and conviction.

[1] The information also charged that defendant had suffered a prior conviction of this same offense. The charge of a prior conviction conferred jurisdiction on the Superior Court. This was true by virtue of the provisions of Section 1425 of the Penal Code which limit Class B justices courts to the trial of crimes amounting to misdemeanors, punishable by a fine not exceeding \$1,000, or imprisonment not exceeding six months. Violation of Section 502 of the Vehicle Code is only a misdemeanor, but by virtue of the provisions thereof, the punishment imposed, upon a second or subsequent conviction thereunder, may be a fine of \$1,000 or imprisonment in the county jail for one year or by both such fine and imprisonment. The provision making possible imprisonment in the county jail for a period in excess of six months placed the matter beyond the jurisdiction of the justice's court and consequently required the arraignment of defendant within the jurisdiction of the Superior Court.

The proceedings on arraignment of defendant, as disclosed by the record, were as follows:

"By the Court: People vs. Hudgins. Arraignment and plea.

"By the District Attorney: We are ready.

"By Mr. Manwell: We will waive the reading of the information.

"By the Court: The District Attorney filed an information in which you are charged under the name of Hallie Harold Hudgins, is that your true name?

"By the Defendant: Yes sir.

"By the Court: You are now ready to plead?

"By the Defendant: Yes sir.

"By the Court: What is your plea?

"By the Defendant: Not guilty.

"By Mr. Manwell: The defendant will admit the prior.

"By the Court: That isn't necessary."

After the selection of the jury, and at the commencement of the trial, the clerk of the court read to the jury the information, including that portion thereof which charged defendant with a prior conviction. Mr. Manwell, attorney for defendant, immediately stated his desire to address a motion to the court, in the absence of the jury. The motion made is as follows: "For the purpose of the record we wish to move the Court to declare a mistrial on the ground the clerk committed a prejudicial error in reading that portion of the information in reference to the previous conviction, under the provisions of Section 1025 of the Penal Code."

The District Attorney resisted this motion, and cited as authority therefor the case of *People v. Forrester*, 116 Cal.App. 240, 2 P.2d 558, to the effect that where, as in the instant case, a prior conviction is an essential element of the crime of which defendant is charged, it is proper for the clerk to read that portion of the information which charges such prior conviction. The trial judge expressed a view in conformity with the position taken by the District Attorney and the motion made by defendant's attorney was denied.

In the opening statement to the jury the District Attorney referred to the charge of a prior conviction and stated that the people would prove that defendant had previously been convicted of a violation of Section 502 of the California Vehicle Code. The attorney for defendant then objected to any reference by the District Attorney to the prior conviction and cited it as pre-

judicial misconduct. Thereafter, and throughout the trial of defendant, including the instructions of the court to the jury, the charge of the prior conviction of defendant was alluded to as an integral part of the offense for which he was brought to trial. Evidence of two prior convictions against defendant for violations of Section 502 of the Vehicle Code were introduced by the prosecution during the trial. The objection of defendant's attorney was overruled.

The jury returned a verdict finding the defendant guilty of the offense set forth in the information. The motion of defendant for a new trial was denied and this appeal is from the order denying such motion and from the judgment of conviction.

It is contended that the trial court committed error at the time of arraignment in failing and refusing to entertain defendant's plea to the prior conviction charged in the information; in permitting the clerk to read that portion of the information pertaining to the prior conviction; in permitting the District Attorney to allude to the prior conviction during the trial and to introduce evidence of proof of such prior conviction; and in exceeding its discretion in commenting on the evidence before the submission of the case to the jury.

The first three specifications of error allegedly committed are directly concerned with the application of the provisions of Section 1025 of the Penal Code to the circumstances as they exist in the present case. Section 1025 provides as follows: "When a defendant who is charged in the indictment or information with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted or informed against, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has



suffered such previous conviction. In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

By reference to the proceedings on arraignment which have heretofore been set forth, it is disclosed that the trial court not only failed to ask defendant whether he had suffered the previous conviction charged in the information, but refused to recognize defendant's voluntary admission that he had suffered such previous conviction. This action on the part of the trial court preceded, as already indicated, the reading to the jury by the clerk of that portion of the information charging the prior conviction, and further reference to the prior conviction by alluding thereto throughout the trial.

[2] The provisions of Section 1025 of the Penal Code are direct and unambiguous in meaning. There is no controversy in regard to the construction of its language. That section clearly requires the trial court at the time of entering the plea to interrogate the defendant in regard to the matter of a previous conviction where the information contains such a charge. The trial court failed to comply with this provision of the section and in effect refused to accept defendant's admission of such prior conviction. Section 1025 further provides that if the defendant pleads not guilty of the offense for which he is charged "and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

It must be conceded that defendant's offer upon the arraignment to admit the prior conviction constituted an admission that he had suffered such previous conviction within the meaning of the provisions of the foregoing section of the Penal Code. It follows therefore that any subsequent reference to such previous conviction by the clerk of the court, the prosecution, or by the trial court would be in direct conflict with the provisions of Section 1025, and consequently constitutes prejudicial and reversible error. This conclusion is inescapable unless the provisions of Section 1025 of the Penal Code do not apply to the circumstances presented in the instant case.

The respondent argues that the prosecution of defendant for violation of Section

502 of the California Vehicle Code was not subject to the application of the provisions of Section 1025 of the Penal Code and that no error was committed in alluding to the previous conviction of defendant. It is contended that a prior conviction for violation of Section 502 of the Vehicle Code is an essential element of the crime committed by a subsequent violation thereunder, and that therefore the situation is comparable to that presented in other cases wherein Section 1025 of the Code has been held not to apply.

[3] The principal case relied upon by respondent is *People v. Forrester*, supra, wherein the defendant was charged with unlawful possession of a certain firearm. Possession of any firearm capable of concealment upon the person is unlawful under the provisions of Chapter 339, Statutes of 1923 (Act 1970, Deering's Gen. Laws of 1923), if such person is not a citizen of the United States of America, or if such person has been convicted of a felony. The information in the *Forrester* case charged defendant with violation of the foregoing statute in that he did have in his possession a firearm capable of concealment, and that he had prior thereto been duly convicted of a felony, to wit, the crime of burglary. The defendant entered a plea of not guilty, and admitted the prior conviction of the felony. As in the instant case, the clerk read the entire information to the jury, including the charge of the prior conviction, and the court also admitted evidence establishing the fact of the former conviction notwithstanding objections on the part of defendant. On appeal it was contended that the admission of the evidence pertaining to the former conviction was prohibited by the terms of Section 1025 of the Penal Code. The court held that Section 1025 did not apply to the circumstances as presented by that particular type of crime. The reasoning of the court is contained in the following language appearing at page 242 of 116 Cal.App., 2 P.2d at page 559, of the opinion: "If the foregoing provisions of section 1025 of the Penal Code apply to the offense of which the defendant was convicted in this action, it would be impossible ever to convict the defendant on this charge. For the offense described in the indictment includes, as a substantive part of the offense, the fact that the person charged with having in his possession the prohibited firearm is a person 'who has

been convicted of a felony against the person or property of another', etc. Notwithstanding the fact that the defendant upon his arraignment admitted the prior conviction, as separately stated in the indictment, he pleaded not guilty to the principal offense and thereby put in issue the alleged fact that, at the stated time and place, he had in his possession the described firearm, he having been theretofore legally convicted of a felony, to wit, burglary, etc. Considering the two statutes together, we are satisfied that the provisions of section 1025 of the Penal Code were not intended to apply to a case where the fact of former conviction is an integral part of the present offense concerning which the defendant is brought to trial."

Respondent also relies upon the case of *People v. McFarlan*, 126 Cal.App. 777, 14 P.2d 1066, wherein the identical question of the application of section 1025 of the Penal Code, under circumstances involving the charge of unlawful possession of a firearm by one formerly convicted of a felony, was before the court on appeal. The court employed the same reasoning contained in the opinion of the court in the *Forrester* case, *supra*, and concluded that the provisions of Section 1025 of the Penal Code were not applicable.

It is disclosed by an examination of the *Forrester* and *McFarlan* cases, *supra*, that a violation of the crimes charged therein required proof of two essential elements: First, the possession of a firearm capable of concealment upon the person, and, second, equally important, a prior conviction of a felony. The possession of the firearm is not unlawful unless the other element is present. Consequently, the prior conviction of a felony is not only a necessary element in constituting a violation of the particular crime, but is an issue which must be presented to the jury to complete the crime charged.

Section 502 of the California Vehicle Code provides that it shall be unlawful for any person to drive a vehicle upon any highway while under the influence of intoxicating liquor. This section of the Vehicle Code does not require as a condition precedent, in order to constitute a violation thereunder, that it be established that the intoxicated person has prior thereto driven a vehicle upon the highway while in the same condition, or that such person has theretofore been convicted of some similar crime. The crime is committed

when the individual drives the vehicle upon the highway while under the influence of intoxicating liquor. Proof of this fact is sufficient. The only matters properly before the jury for consideration in such a case concern the question as to whether the defendant was at the time and place mentioned in the information driving a vehicle upon the highway while under the influence of intoxicating liquor. A prior conviction has no bearing upon the issue presented. As already indicated, the only result of a prior conviction for violation of the foregoing section of the Vehicle Code is an increase of punishment upon conviction of the subsequent offense. The only reason for alleging the previous conviction is for the purpose of enabling the court to impose the greater punishment. There is nothing contained in the language of Section 502 of the California Vehicle Code which could possibly be construed to effect a different result in the event of a charge of a subsequent violation thereunder from that which is indicated. The fact that the information charged a prior conviction, thus making possible the imposing of a greater penalty upon a conviction of a subsequent offense and thereby placing the matter beyond the jurisdiction of the justice's court only concerns the question of jurisdiction, and in no way lends support to the argument that the former conviction is an integral part of the offense for which defendant is brought to trial.

Language contained in the opinion of the court in the case of *People v. Oppenheimer*, 156 Cal. 733, 106 P. 74, makes a clear distinction between the type of crime where the fact of the previous conviction is an essential element of the offense charged, and the other class of crimes, such as a violation of Section 502 of the Vehicle Code, which offense is in no way dependent upon a prior conviction. The pertinent language at page 738 of 156 Cal., 106 P. at page 77 of the opinion is as follows: "For the purpose of showing that the defendant was guilty of the offense defined by section 246 of the Penal Code, it was alleged in the information that at the time of the alleged assault he was undergoing a life sentence in the California state prison at San Quentin under and by virtue of a certain described judgment of the superior court of Sacramento county. It was essential, of course, to allege facts showing that defendant was then undergoing a life sentence, in order to state the public offense intended to be charged. On

his arraignment he was allowed, at his own request, in addition to pleading not guilty of the offense charged, to admit that he had suffered the conviction alleged in the information. He now claims that, having admitted such 'previous conviction' on his arraignment, the clerk of the court, in reading the information to the jury on the trial, should have omitted therefrom all that related thereto (Pen. Code, sec. 1093, subd. 1), and that no evidence relating to the same should have been received on the trial. (Pen. Code, sec. 1025.) The provisions of the Penal Code thus relied on by him have reference exclusively to those cases where a previous conviction of some other and distinct offense is alleged for the purpose of enabling the court to impose a greater punishment than is authorized for the offense charged when there is no prior conviction (see Pen. Code, secs. 666, 667, and 668), and can have no application where the fact of the prior conviction is an essential element of the offense charged."

The question of the application of Section 1025 of the Penal Code was again raised in the case of *People v. Schunke*, 47 Cal.App.2d 542, 118 P.2d 314, in which case the defendants were charged with the violation of the Dangerous Weapons Control Law of 1923, Gen. Laws 1937, Act 1970, and the information accordingly alleged previous convictions. The opinion of the court stated that it was necessary for the prosecution to establish two elements in proof of a violation: Possession of a dangerous weapon and previous conviction of a felony. The opinion cites as authority the case of *People v. Oppenheimer*, supra, and in disposing of the contention that Section 1025 of the Penal Code precluded the introduction of evidence pertaining to the previous convictions, the court at page 544 of 47 Cal.App.2d, 118 P.2d at page 315 of the opinion stated as follows: "These provisions refer exclusively to cases in which previous convictions are alleged for the purpose of enabling the court to impose a greater punishment. They have no reference to cases in which the prior conviction is an essential element of the offense for which the accused is on trial."

[4] It has been sufficiently demonstrated, we believe, in the citation of the foregoing authorities, that a prior conviction for violation of Section 502 of the California Vehicle Code is in no sense an essential element for consideration in the trial of a defendant charged with a subsequent vio-

lation thereof, and that the prosecution of the defendant in the present case was unquestionably subject to the application of the provisions of Section 1025 of the Penal Code.

[5] The act of the clerk of the court in reading that portion of the information which charged the previous conviction and further reference during the trial by the prosecution and by the court to such previous conviction of defendant was a violation of Section 1025 of the Penal Code and constituted prejudicial error. *People v. Smith*, 96 Cal.App. 373, 274 P. 451; *People v. Thomas*, 110 Cal. 41, 42 P. 456.

In view of our conclusion in regard to the action of the trial court in failing to conform to the provisions of Section 1025 of the Penal Code, which action constituted reversible error, it is unnecessary to determine the question as to whether the court exceeded its authority in commenting on the evidence.

The judgment and the order are reversed.

ADAMS, P. J., and PEEK, J., concur.



59 Cal.App.2d 124

FIETZ et al. v. HUBBARD.

Civ. 2842.

District Court of Appeal, Fourth District,  
California.

June 9, 1943.

#### 1. Negligence ☞6

Generally, violation of a statute is "negligence per se".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

#### 2. Automobiles ☞245(8)

In action for injuries sustained by 18-year-old bicyclist colliding with automobile, where motorist, because two automobiles had suddenly stopped in path which he should have followed, drove on his left-hand side of street into which he was turning, whether motorist's failure to comply



with statute requiring him to pass to right of center of intersection before turning was excused, was for jury. Vehicle Code, § 525(a), St.1939, p. 2197.

### 3. Trial ⇨253(4)

Instruction that, before proceeding upon a highway, one must ascertain that his way is clear and keep his vehicle under control, was improper as omitting elements that contributory negligence may not ordinarily be predicated on the omission to assume that another may violate the law that one is required to use only ordinary care to avoid an accident, and that one who is free from negligence may rely on the presumption that another will not violate the law.

### 4. Negligence ⇨68

Contributory negligence may not ordinarily be predicated on an omission to assume that another may violate the law.

### 5. Negligence ⇨67

A person need use only ordinary care to avoid an accident.

### 6. Negligence ⇨68

Only one who is free from negligence may rely on the presumption that another will not violate the law.

### 7. Trial ⇨295(1)

Instructions must be considered as a whole to determine the effect to be given to one that is technically insufficient in omitting necessary elements.

### 8. Trial ⇨295(1)

The test of the effect to be given a technically insufficient instruction omitting necessary elements is whether, in view of the instructions given, the jury as reasonable men and women might have been misled.

### 9. Appeal and error ⇨1066

Instruction on motorist's duty to avoid collisions on highway was not prejudicial error for omitting necessary elements clearly stated in other instructions.

### 10. Automobiles ⇨242(8)

Where 18-year-old bicyclist was rendered unconscious by collision with automobile turning left at intersecting street and could not remember what lookout, if any, she kept, plaintiffs were entitled to presumption that bicyclist exercised ordinary care for her own safety, but presumption was disputable and could be overcome

by other evidence. Code Civ.Proc. § 1963, subd. 4.

### 11. Evidence ⇨89

The presumption that a person takes ordinary care for his own concerns merely raises a conflict in the evidence which must be settled by jury where there is other evidence to the contrary and such evidence may be circumstantial as well as direct. Code Civ.Proc. § 1963, subd. 4.

### 12. Automobiles ⇨245(74)

Where 18-year-old bicyclist was rendered unconscious by collision with automobile turning left at intersecting streets and could not remember what lookout, if any, she had kept, circumstantial evidence that bicyclist did not look for obstructions, and presumption that bicyclist had used ordinary care made question whether bicyclist had kept proper lookout one of fact for jury. Code Civ.Proc. § 1963, subd. 4.

### 13. New trial ⇨152

Motion made after judgment for permission to amend notice of motion for new trial is addressed to trial court's sound discretion.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Edith K. Fietz, a minor, by her guardian ad litem, H. E. Fietz, and another against Albert M. Hubbard for injuries sustained in an automobile accident. From a judgment for defendant and an order refusing plaintiffs' permission to amend their notice of motion for new trial, plaintiffs appeal.

Judgment and order affirmed.

J. K. Stickney, Jr., Harry W. Moss, and Stickney & Stickney, all of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of defendant in an action to recover damages resulting from a collision between an automobile driven by defendant, and a bicycle ridden by Edith K. Fietz, a minor of the age of eighteen years. H. E. Fietz, father of the minor, sought to recover the bills incurred by him in treating the injuries suffered by his daughter.

The accident happened in the intersection of Fairmount Avenue and El Cajon Boulevard in the city of San Diego, at about five o'clock in the afternoon of October 5, 1940. The day was clear and the roadway was dry.

Plaintiffs maintain that the evidence shows defendant was guilty of negligence as a matter of law that was the proximate cause of the collision; that Miss Fietz cannot be charged with contributory negligence because she had no recollection of the accident and therefore was entitled to the presumption of having taken due care for her safety; that certain instructions given to the jury were prejudicially erroneous. Consideration of these contentions will require a detailed summary of the evidence.

West of Fairmount Avenue, El Cajon Boulevard, an east and west street, is a divided highway. The north roadway is thirty-six feet and ten inches between curbs, and the south roadway is thirty-two feet six inches between curbs. Both roadways are paved. East of Fairmount Avenue the single roadway is sixty-nine feet six inches between curbs. Fairmount intersects El Cajon at right angles and is a paved street forty feet wide between curbs.

Miss Fietz and Jean Voris were friends. They were students at San Diego State College. Miss Fietz was an experienced bicycle rider and the two went for a bicycle ride on the afternoon of October 5, 1940. They were proceeding east on El Cajon Boulevard and as they approached Fairmount Miss Fietz was about ten feet, or slightly more, ahead of Miss Voris. Miss Fietz saw an automobile facing north on Fairmount. It was stopped at the south edge of the intersection. She then proceeded on her way across Fairmount. She was rendered unconscious by the collision and remembered nothing about it. Miss Voris was not called as a witness.

The only witness produced by plaintiffs, who saw the collision, was Hattie Gardiner. She was walking east on the sidewalk on the south side of El Cajon Boulevard. When she was about three feet west of the west curb on Fairmount she heard the two girls talking and turned and saw Miss Fietz and Miss Voris riding their bicycles east on El Cajon Boulevard, just north of the south curb. She saw defendant's automobile making a left turn from El Cajon Boulevard southerly over the intersection. It was east of the center line of Fairmount Avenue. Miss Fietz passed the witness,

who had stepped into the crosswalk. Miss Voris called out a warning to Miss Fietz, saying, "Look out there." The witness also called a warning just before the collision. It is assumed that Miss Fietz did not hear these warnings as she did not stop, but crashed into the right front door of the Hubbard sedan. This witness did not see any automobiles traveling north on Fairmount Avenue and crossing the intersection immediately before the collision. She testified that there were three rows of cars traveling east on the south half of El Cajon Boulevard at that time.

The only other eyewitnesses to the accident who testified at the trial were defendant and his wife. Defendant testified that he was driving his car west on the north half of El Cajon Boulevard; that he stopped at the east intersection line to let the traffic in the intersection clear as he wished to make a left turn into Fairmount; that two cars proceeding north on Fairmount stopped at the south intersection line; that these cars passed into the southwest quarter of the intersection; that he had started his left turn intending to pass to the rear of these cars and down the west half of the intersection and Fairmount Avenue; that both of these cars stopped in the intersection completely blocking its southwest quarter; that because of these standing cars blocking his way to the west half of Fairmount he had to make his turn to the east of the cars and in the southeast quarter of the intersection in order to pass back of them onto the west half of Fairmount; that his car was in low gear traveling about five miles an hour; that when he was clearing the rear of the south car which had stopped in the intersection his wife called out in alarm and he immediately stopped his car; that Miss Fietz on her bicycle emerged from behind the rear stopped car and crashed into the rear of the right front door of his car; that his car was then standing in the southeast quarter of the intersection with its left front wheel a short distance westerly from the curb at the south east corner of the intersection. He admitted that his automobile was on the east, or "wrong" half of Fairmount.

Mrs. Hubbard corroborated the testimony of her husband in all material respects.

Plaintiffs urge that defendant was guilty of negligence as a matter of law because he failed to make his left turn "by passing immediately to the right of the center of the intersection before turning" as required

by subdivision b of section 540 of the Vehicle Code.

In this connection it is argued that the court misdirected the jury by reading to it subdivision a of section 525 of the Vehicle Code, St.1939, p. 2197, and led the jurors into error by concluding that instruction as follows: "In passing upon the conduct of the parties involved in such accident you are to view their conduct in the light of the circumstances that existed immediately prior to the accident and determine what an ordinarily reasonable person would or would not have done under the same or similar circumstances. It is provided by the California Vehicle Code, among other things, that a person operate a vehicle upon the right hand side of the street and as near the right hand curb as practicable. A violation of this provision of the code just like the violation of any other statutory rule of the road, is negligence. However, the rule with reference to driving upon the right hand side of the highway is not inflexible. A party is authorized to proceed on to the left hand side of the highway if the right hand side of the highway is obstructed, provided he takes reasonable care, commensurate with the risk involved, to ascertain that his movement to the left hand side of the highway can be made in safety."

[1] Plaintiffs argue that the admitted fact that defendant did not make his left turn in the manner required by statute establishes his negligence; that violation of a statute is negligence per se. Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 80 P.2d 1044; Anderson v. Pacific Tank Lines, 52 Cal.App.2d 244, 126 P.2d 153. This is generally true, but there are well established exceptions to this rule, where, under the special circumstances of a particular case, the violation of a statute may be excused. This exception has been recognized in many cases of which we cite the following: Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061; Raymond v. Hill, 168 Cal. 473, 143 P. 743; Lawrence v. Goodwill, 44 Cal.App. 440, 186 P. 781; Kofoid v. Beckner, 70 Cal. App. 624, 234 P. 113; Zohner v. Sierra Nevada L. & C. Co., 114 Cal.App. 85, 299 P. 749; Parker v. Auschwitz, 7 Cal.App.2d 693, 47 P.2d 341; Lowe v. City of San Diego, 8 Cal.App.2d 440, 47 P.2d 1083; Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51; Finney v. Wierman, 52 Cal.

App.2d 282, 126 P.2d 143; Prescott v. City of Orange, Cal.App., 132 P.2d 523.

[2] In the instant case, according to his testimony, defendant was entering the intersection to make his left turn and found his way blocked by two cars which suddenly stopped in the path he should have followed. Just what a reasonably prudent person should have done under the circumstances is certainly not so clear that we can say as a matter of law that defendant's subsequent conduct rendered him absolutely guilty of negligence. The circumstance suddenly confronting him may have excused his failure to follow the letter of the law. As reasonable minds might differ on the question, it was one of fact that was properly submitted to the jury.

Plaintiffs argue that the jury was misled by the instructions and quote the following: "It is required that all parties operating vehicles upon the highway keep a reasonable lookout for the presence of other parties and vehicles upon the highway. No party is entitled to assume that the way is clear or that there is no traffic upon any part of the highway which he is about to use. In other words, before proceeding upon the highway a person is required to ascertain that his way is clear and keep his vehicle under such control that he may avoid collision in case the way be not clear. The duty is likewise applicable to both parties involved in this collision."

[3-6] Taken by itself this instruction omits two important elements: (1) That contributory negligence may not ordinarily be predicated on the omission to assume that another may violate the law (Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 186 P. 800; Olsen v. J. J. Jacobs Motor Co., 99 Cal.App. 423, 278 P. 105; Prato v. Snyder, 12 Cal.App.2d 88, 55 P.2d 255); and (2) that it failed to inform the jury that a person is only required to use ordinary care and skill to avoid an accident. Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Corvello v. Baumsteiger, 115 Cal.App. 194, 1 P.2d 484. It also omits the element that it is only a person who is free from negligence who may rely on the presumption that another will not violate the law. Truitner v. Knight, 83 Cal.App. 655, 257 P. 447; Doyle v. Loyd, 45 Cal.App.2d 493, 114 P.2d 398.

However, other instructions thoroughly covered these questions.



Sections 86, 540, 544 and 551, St.1935, pp. 99, 184-186, relating to the turning of a vehicle to the left at an intersection, were given and were succeeded by the following: "You are further instructed that if you find from all of the evidence in this case that the defendant failed to comply with and observe any of the provisions of the sections above quoted at the time and place in question, such failure or neglect on his part would, under the law, constitute negligence."

After properly defining negligence and proximate cause, the following instruction was given:

"Negligence is not absolute or extrinsic, but always relates to some circumstance of time, place or person. You are instructed that it is the law of California that a violation of a statute which directly or proximately causes injury to another constitutes negligence, as a matter of law.

"You are further instructed that every person has the right to presume that every other person will perform his duty and obey the law and in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which may result from the violation of a law or duty by such other person."

The following instructions were also given:

"You are further instructed that bicycle riders have the same right as automobile drivers to use the streets, and a bicycle rider as well as an automobile driver is chargeable only with such ordinary and reasonable care for his or her own safety as a prudent person under the same or similar circumstances."

"You are further instructed that a bicycle rider who is operating her bicycle in a careful and prudent manner is not bound to assume that the driver of an automobile will act otherwise than in a careful and prudent manner, and such bicycle rider has the right to assume that an approaching automobile driver will exercise due care and observe the law in executing a left turn."

[7-9] It is well established that the instructions must be considered as a whole in order to determine the effect to be given to one that is technically insufficient in omitting elements that should have been included. In *Ward v. Read*, 219 Cal. 65, 25 P.2d 821, 822, one test of this effect is stated as follows: "But the question with which we

are concerned is whether, in view of all the instructions given, the jury as reasonable men and women might have been misled so as to apply an incorrect rule of law." Measured by this rule we cannot conclude that the erroneous instruction could have led the jury into a mistaken application of erroneous rules of law. The missing elements in that instruction, important to plaintiffs, were clearly stated in others and, taken as a whole, the instructions cannot be considered sufficiently erroneous to require a reversal of the judgment.

[10, 11] It is also argued that it was error to submit to the jury the question of negligence of Miss Fietz based on the care or lack of care she exercised in keeping a lookout for vehicles in her path. This argument is based on the fact that she was rendered unconscious by the collision and could not remember what lookout, if any she kept and the presumption "that a person takes ordinary care of his own concerns". Subdiv. 4, sec. 1963, Code Civ.Proc. Under the circumstances here plaintiffs are entitled to the benefit of this presumption. It is disputable and may be overcome by other evidence. *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590; *Scott v. Sheedy*, 39 Cal. App.2d 96, 102 P.2d 575; *Hoppe v. Bradshaw*, 42 Cal.App.2d 334, 108 P.2d 947. Where there is other evidence to the contrary, the presumption raises a conflict in the evidence which must be settled by the jury. This evidence to the contrary may be circumstantial as well as direct.

[12] Here there was circumstantial evidence to the effect that Miss Fietz did not look for obstructions in her path. A person who looks should see a large sedan in front of her. *Hattie Gardiner and Miss Voris* saw this sedan in time to give warning to Miss Fietz before the collision. Miss Voris was ten or more feet to the rear of Miss Fietz and saw the sedan from that position which would indicate that Miss Fietz could have seen it also had she looked. These circumstances and the fact that she crashed into this sedan after the warnings were given furnished grounds for the reasonable inference, if drawn by the jury, that she did not maintain a lookout for vehicles in her path. Clearly the question was one of fact for the jury and is not one of law for this court.

[13] Plaintiffs have also appealed from an order, made after judgment, refusing them permission to amend their notice of

motion for new trial. Such a motion is addressed to the sound discretion of the trial court and no abuse of discretion is made to appear here. The matter is not stressed in the briefs.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J.,  
concur.



59 Cal.App.2d 107

**PEOPLE v. PILLSBURY.**

Cr. 3684.

District Court of Appeal, Second District,  
Division 3, California.

June 8, 1943.

**1. Embezzlement ☞1**

False pretenses ☞1

Larceny ☞1

"Theft" includes the offenses formerly known as larceny, of obtaining property by false pretenses, and embezzlement.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

**2. False pretenses ☞12**

Accused who did not obtain title to automobile was not guilty of "obtaining property by false pretenses".

See Words and Phrases, Permanent Edition, for all other definitions of "Obtaining Property by False Pretense".

**3. Embezzlement ☞1**

Where the original taking was of the same character as the subsequent detention, whether both were innocent or both fraudulent, a case of "embezzlement" was not made out.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

**4. Larceny ☞14(1)**

An essential ingredient of the offense of "larceny by fraud, trick, or device" is an intent, without claim of right or justification, to deprive owner of his property wholly and permanently.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny by Fraud, Trick, or Device".

**5. Larceny ☞14(1)**

Where original taking involved no actual trespass or violence, the felonious intent to deprive owner of his property wholly and permanently must have existed at the time of the taking in order to constitute offense of "larceny by fraud, trick, or device".

**6. Larceny ☞57**

Evidence that accused obtained possession of automobile by false statements as to prospects of selling it and retained possession by repetition of similar falsehoods did not sustain conviction of grand "theft" in absence of evidence of a felonious intent to deprive owner of his property wholly and permanently.

**7. Criminal law ☞1159(5)**

In prosecution for grand theft, where evidence and possible implications therefrom, even though conflicting, will reasonably admit of an inference of felonious intent, the question of intent is solely one of "fact" for trial court or jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

**8. Criminal law ☞1159(5)**

Where inference of a felonious intent essential to conviction of larceny by fraud, trick, or device found no rational support in the evidence, accused's intent became a "question of law" for appellate court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

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Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Charles A. Pillsbury was convicted of grand theft of an automobile, and he appeals.

Judgment reversed and cause remanded for a new trial.

James O. Warner, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen. for respondent.

SHAW, Justice pro tem.

After a trial by the court sitting without a jury, the defendant was found guilty of grand theft of an automobile. He now appeals from the judgment, presenting as his sole point on appeal the contention that the evidence is insufficient to support the trial court's finding of guilt. This contention must be sustained.

The automobile in question was owned by Carl R. Menikheim, hereinafter referred to, following the witnesses, as "Carl." He was called into military service in April, 1942, and left the automobile in charge of his fiancée, Miss Dorothy Jerome. She did not use it, but had the keys and kept it stored in a garage.

About two weeks after Carl went into the army, the defendant came to the store where Miss Jerome worked and told her he could sell the car if Carl was interested in selling it. He said he worked for the Edison Company and his boss, Roy L. Newell, was interested in buying the car. She wrote to Carl, and when defendant later called her by telephone told him Carl would sell the car for \$1,000 cash. Defendant then came to the store and brought Miss Jerome forms of power of attorney and authorization for payment, apparently for Carl to sign. These papers were introduced in evidence but have not been brought up as a part of the record, so we do not know their contents. However, we assume from what is said of them in the record that they constituted some sort of authorization for Miss Jerome to act for Carl in transferring the automobile. Carl signed these papers and sent them back to Miss Jerome, and thereupon, about the last part of May or the first of June, 1942, Miss Jerome gave defendant the keys to the car and he took possession of it. He told Miss Jerome at the time that he would deliver the car to Mr. Newell and bring the money to her, "next week." She believed defendant's story and was induced thereby to turn the car over to him.

Next week defendant called Miss Jerome and told her he was delayed and would bring her the money the last of the week. A little later he told her he would have to make some repairs to the car before his boss would accept it and when she demurred to this, defendant said his boss would pay \$1,100 for the car. He told her he did not want to bring the car back as she re-

quested, because he wanted to work on these repairs in his spare time. She then gave him permission to keep the car for this purpose. On June 21st Carl came down to Los Angeles from the military camp, and defendant brought the car to Miss Jerome, he and she and her sister met Carl at the bus station, and then Carl and Miss Jerome, after letting the other two out, drove the car to her home. During this trip defendant told Carl about the deal for \$1,100 cash, said he had to make a few repairs, and Carl said to him "For \$1100, you go ahead and sell it." Later on the same day Carl returned to camp and defendant took the car again. At the time he said he would bring the money the following week.

Several times more the defendant put Miss Jerome off, promising to have the money soon. On July 13, 1942, after Miss Jerome had asked him for the car, he showed her a check for \$500, purporting to be signed by Roy L. Newell, which he said was a deposit on account of the car, but he declined to let her have the check. On July 22, he brought the car and showed it to her, calling attention to a chrome strip he had put on it and some polishing he had done. Several more conversations between defendant and Miss Jerome consisted of demands for the money by her and excuses for its nonproduction, with promises to produce it soon, by him. On August 3 he told her he had delivered the car to Newell and had all the money and was waiting for Newell's wife to sign a release, and would then bring the money out. He did not do so. On August 5 she told him she had to have the money or the car, or she would go to the authorities. She got neither, so she made complaint and defendant was arrested. He told the arresting officer where the car was parked, on a street, the officer found it there, and returned it to Miss Jerome.

It appears that while defendant had the car he did replace a chromium strip and make a few other minor repairs to the car. It also appears that he was, or had been, engaged in making occasional sales of used cars, though not licensed as a dealer. Defendant's counsel stipulated, and defendant also testified at the trial, that defendant did not work for the Edison Company, that there was no such person as Roy L. Newell, and that the purported check which defendant showed Miss Jerome was written by defendant himself. The defendant never



had possession of the papers signed by Carl and nothing was ever done by way of transferring title in the car to him.

[1-3] The charge against defendant, theft, includes the offenses formerly known as larceny, obtaining property by false pretenses and embezzlement. Defendant contends and the people admit, that a case of false pretenses does not appear here because defendant obtained no title to the car. This contention is well taken. Both parties also agree that the case is not one of embezzlement because the original taking was of the same character as the subsequent detention, defendant contending that both were innocent and the people viewing both as fraudulent and wrongful. Either state of the case would exclude embezzlement from consideration. The question remaining for consideration, as both parties agree, is whether a finding that defendant committed larceny by fraud, trick or device, is supported by the evidence. No doubt the fraud, trick or device clearly appears here. By his own admissions, defendant is shown to have been an unmitigated liar, telling a story with no foundation whatever in fact, for the purpose of getting possession of the automobile, and Miss Jerome believed the story and was induced thereby to surrender possession of the car to him, not intending then to part with title. The same can be said of Carl Manikheim, the real owner of the car. Two of the other essential elements of this crime, as they are stated in *People v. Edwards*, 1925, 72 Cal.App. 102, 112-116, 236 P. 944, clearly appear, that is, that the car was the property of another, and that it was taken into the sole possession of the defendant.

[4-6] But another essential ingredient of the offense is an intent, without claim of right or justification, to deprive the owner of his property wholly and permanently. (15 Cal.Jur. 906; *People v. Coon*, 1940, 38 Cal.App.2d 512, 516, 101 P.2d 565; *People v. Edwards*, supra, 72 Cal.App., at page 116, 236 P. 944; *People v. Payne*, 1931, 117 Cal.App. 108, 111, 3 P.2d 328.) And where, as here, no actual trespass or act of violence is involved in the original taking, the felonious intent must exist at the time of the taking. (15 Cal.Jur. 908, *People v. Edwards*, supra; *People v. White*, 1924, 66 Cal.App. 703, 706, 226 P. 962.) Looking at the evidence in this case, we are unable to see any such intent. The defendant's avowed purpose in taking possession of the automobile was to make a sale of it and this he was au-

thorized to do by the owner. He lied about his prospect for a sale, and continued to lie whenever he was asked to produce the proceeds of a sale or surrender possession of the car. But he drove other cars while in possession of the car in question, and there is no evidence that he used that car for any purpose of his own, or did anything with it inconsistent with his avowed purpose of finding a buyer for it. He did make some of the repairs which he said were necessary to facilitate a sale. He surrendered the car to the owner when the latter needed it for his own use, and the owner at that time agreed that defendant might sell the car. Defendant later showed the car to the owner's agent. It does not appear that he ever concealed its whereabouts from owner or agent, or denied the rights of either to the car. He did not have the owner's registration slip or attempt to again possession of it. It did not appear that he ever found a buyer or was able to make a sale. His web of deceit was woven, as it seems to us, merely to enable him to obtain and keep possession of the car temporarily, in the hope that he might be able to sell it and thereby earn a commission. As the court said in *People v. Coon*, supra [38 Cal.App.2d 512, 101 P.2d 567]: "The course of conduct pursued by appellant \* \* \* is not compatible with the ordinary surreptitious activities of a thief." Upon the undisputed evidence it would appear that the circumstances established at most a civil wrong considerably aggravated by defendant's repeated falsehoods.

[7,8] Respondent contends that the question of defendant's intent is solely one of fact for the trial court or jury, citing 15 Cal.Jur. 907, and other authorities to that effect. This is no doubt true where the evidence, with the possible implications therefrom, will, even though conflicting, reasonably admit of an inference of felonious intent. But the rule is the same here as on any other question of fact; where the evidence furnishes no rational support for an inference, on appeal the question becomes one of law for the appellate court, which may, in such case, declare the inference unsupported. (8 Cal.Jur. 593.)

The judgment is reversed and the cause is remanded for a new trial.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

59 Cal.App.2d 99

**YOUNIS et al. v. HART et al.**  
**Civ. 14011.**District Court of Appeal, Second District,  
Division 2, California.

June 8, 1943.

**1. Husband and wife** ⇨232(3)

Where title to realty sold stood in name of husband and he received the cash payment and caused notes and trust deed securing it to be made payable to himself as his "separate estate", evidence, including the fact that wife signed the grant deed conveying property, did not authorize judgment against wife in purchasers' action to rescind for vendors' fraudulent representation as to area of tract, where wife took no part in transaction and neither made a representation nor escrow instructions.

**2. Vendor and purchaser** ⇨37(1)

A single material misstatement knowingly made by vendor and relied on by purchaser warrants rescission by purchaser with damages.

**3. Fraud** ⇨25

Precise amount of damage suffered in a fraudulent sale of realty is material, but fraud is the essential element if its victim is in a worse position by reason thereof.

**4. Vendor and purchaser** ⇨37(2)

Vendor's representation that area of lots was 110 feet by 300 feet, whereas area was only 102.79 feet by 110 feet, so that actual area was 2,163 feet less than represented, constituted a "material misrepresentation" entitling purchasers to rescind.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Misrepresentation".

**5. Vendor and purchaser** ⇨37(2)

Vendor's representation that easterly line of lot was 7 feet east of easterly wall of building formerly used as dance hall, whereas, in fact, it was flush with east wall thereof, was a "material misrepresentation" justifying rescission by purchasers.

**6. Vendor and purchaser** ⇨37(2)

Where purchasers relied on vendor's representation as to area of two lots in

making purchase, fact that they visited property and walked over it to make inspection did not preclude them from relying on vendor's misrepresentation to obtain rescission of transaction for vendor's fraud.

**7. Vendor and purchaser** ⇨37(1)

Purchaser has absolute right to rely on express statement of vendor concerning existing fact, truth of which is known to vendor and unknown to purchaser.

**8. Fraud** ⇨22(1)**Vendor and purchaser** ⇨37(2)

The mere fact that opportunity and means for ascertaining exact frontage of lots purchased were available to purchasers did not defeat their right to rescind and recover damages for vendor's fraudulent misrepresentation as to frontage.

**9. Vendor and purchaser** ⇨37(2)

Where there was substantial proof that vendor misrepresented frontage of lots, that representation was material, that purchasers relied thereon, and that it was false and uttered with knowledge of its falsity, purchasers were entitled to rescind if they acted promptly and if their offer of rescission was sufficient.

**10. Vendor and purchaser** ⇨119

Where purchasers did not discover vendor's fraud in misrepresenting frontage of lots until three months after they had moved into premises, on which they immediately advised vendor of the discovery, and their suggestion of friendly rescission and payment of damages was refused by vendor, on which purchasers promptly gave vendor formal notice of rescission, the notice of rescission was not ineffective because of "laches". Civ.Code, § 1691.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

**11. Vendor and purchaser** ⇨120

Purchasers' notice to vendor of rescission on ground of fraudulent representations as to frontage of lots "explained in prior letters", denying all liability on notes given on purchase price announcing readiness to reconvey on condition that purchasers be placed in statu quo, substantially complied with statutory requirements, and demand therein for damages for an amount

later established to be in excess of damages actually sustained and other informalities in notice, were cured by vendor's prior denial of fraud and refusal to rescind. Civ.Code, § 1691.

#### 12. Vendor and purchaser ⇐123

In purchasers' action for rescission on ground of vendor's fraudulent misrepresentation as to frontage of lots and for damages, judgment canceling vendor's deed, bill of sale to furniture, and purchasers' note, and ordering return of furniture on vendor's payment of sums adjudged to be due purchasers, comprehended all the issues and disposed of case completely.

#### 13. Interest ⇐39(3)

Interest on an unliquidated claim begins to run only from date of judgment.

#### 14. Interest ⇐19(1)

Judgment for purchasers suing to rescind on ground of vendor's fraudulent misrepresentation as to area of lots purchased and for damages improperly included item for interest, since claim for damages was "unliquidated".

See Words and Phrases, Permanent Edition, for all other definitions of "Unliquidated Claim".

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Appeal from Superior Court, Los Angeles County; Harold C. Shepherd, Judge pro tem.

Action by George Younis and another against Alfred E. Hart and his wife, Beatrice O. Hart, and another, for rescission of the purchase of real and personal property on the ground of fraud. Judgment for plaintiffs, and defendants appeal.

Judgment against defendant Beatrice O. Hart reversed with instructions, and judgment against defendant Alfred E. Hart modified and, as so modified, affirmed.

D. Chase Rich, of Los Angeles, for plaintiffs and respondents.

Roland T. Williams, of Los Angeles, for defendants and appellants.

MOORE, Presiding Justice.

Defendants appeal from a judgment of rescission on account of their alleged fraud in the sale of real and personal property. Their contentions though otherwise expressed are encompassed within the following: The evidence does not support

the findings and the findings do not support the judgment; the notice of rescission is inadequate; plaintiffs were guilty of laches; the judgment does not dispose of the case completely.

From the findings we glean the story that culminated in this appeal. On December 11, 1941, defendants, husband and wife, were the owners of lots H and 24, two adjacent parcels in the City of San Gabriel together with all the improvements thereon and the furniture in the residence. Those two parcels will be discussed herein as the lot. Alfred Hart was a realtor and Beatrice was his wife. In order to induce plaintiffs to purchase the lot and the moveable property, defendants represented and stated to plaintiffs that the realty had a frontage on Valley Boulevard of 110 feet; that its easterly line was about 7 feet east of the easterly side wall of the building at the rear which was formerly used as a dance hall. Such statement was believed by plaintiffs, but it was untrue. The frontage was only 102.79 feet. It was also represented that the state and county annual taxes on the realty was \$100, whereas in truth it was \$157.34. Inasmuch as we have concluded that the representation with reference to the taxes was immaterial and that plaintiffs had notice of the true amount at the close of the transaction, we shall take no further notice of that particular statement. The representation with respect to the frontage of the lot was willfully made by defendants for the purpose of defrauding plaintiffs and of inducing them to purchase the property.

By the terms of sale agreed upon, plaintiffs assumed an indebtedness secured by the property in the sum of \$3,096.07 in favor of a Building and Loan Association, payable in monthly installments of \$35; executed their promissory note in favor of defendant Alfred in the sum of \$1,803.93 with interest payable in monthly installments of \$20 each and also a second trust deed of the lot to secure the payment of such note. They paid in cash the sum of \$500. The aggregate of their cash and their note and the note secured by the first lien was \$5,400, the purchase price. In return for the foregoing, defendants executed and delivered to plaintiffs a grant deed conveying the real property and Alfred delivered his bill of sale conveying the furniture. Plaintiffs entered into and occupied the property about



December 20, 1941, and thereafter made four payments to the Building and Loan Association and four payments to defendants on the second lien. Although plaintiffs stated to Alfred Hart at their first meeting their plans for remodeling the dance hall into two living apartments for rental purposes he did not deign to correct his former statement that the frontage was 110 feet. Neither did he allude to the impossibility of extending the structure to the eastward. After the occupancy by plaintiffs, it developed that the frontage of the lot on Valley Boulevard was only 102.79 feet.

In January 1942 plaintiffs applied to the city for a permit to remodel the dance hall into living apartments and paid an architect \$35 to supervise the work. But on April 2 the permit was denied for the reason that the easterly line of the dance hall was flush with the easterly line of the lot and that "under the ordinances then in force, apartments for human habitation were required to be constructed with at least three feet of light and ventilation between the building and the property line." Upon learning the exact frontage of the lot from the denial of the permit, plaintiffs offered in writing to restore to defendants the possession and title of both the real and personal property, upon the return of all moneys paid as a result of their acquisition of the property and upon the cancellation of all instruments evidencing their liability. Defendants having refused to cancel the documents or to refund any of the money paid out by the plaintiffs on account of the purchase, plaintiffs vacated the property about June 1, 1942. Having occupied the premises for 5½ months, plaintiffs were assessed the sum of \$165 on the basis of \$30 per month for such occupancy.

Based upon such findings, it was adjudged that the promissory note and trust deed executed by plaintiffs to the defendant, Alfred, and the bill of sale and the grant deed to plaintiffs and all other agreements of the parties obligating plaintiffs to pay moneys to or for the use of defendants be cancelled and that plaintiffs should recover the sum of \$844.93 less \$165, with interest from the several dates of payment, aggregating \$29.39.

[1] Before discussing the general merits of the appeal, it will be in order first to consider the status of Beatrice O. Hart under the judgment. There is no sub-

stantial basis for the award against her. She took no part in the transaction. She neither made a representation nor signed the escrow instructions. While it is true that she signed the grant deed conveying the property to plaintiffs, that was evidently done in compliance with the demands of her husband under advice that her signature was indispensable to a perfect title. The only fact that would justify an inference that she had an interest in the real property was that the title stood in the name of her husband which might indicate its community character. But Alfred received the cash payment and caused the note and trust deed securing it to be made payable to himself as his "separate estate." In view of these facts and of the presumption of innocence of Mrs. Hart we must conclude that the evidence is insufficient to warrant a finding against her. We conclude therefore that the judgment against Beatrice O. Hart is wholly without support and should be reversed. Alfred Hart will hereafter be referred to as the defendant.

[2-5] The representation that the area of the lot was 110 feet by 300 feet indicated that the surface contained 2,163 square feet more than its actual content. While such an exaggeration of the acreage of a cotton plantation might be unimportant, yet in the purchase of a city lot, a statement that its area is that much greater than its exact measurements is material and goes directly to the heart of the transaction. Moreover, his statement that the easterly line of the lot was seven feet east of the easterly concrete wall of the ex-dance hall while in fact it was flush with the east wall thereof was itself a material misrepresentation and it was sufficient to justify a rescission. A single material misstatement knowingly made by a vendor and relied upon by his vendee will warrant a rescission with damages. *Davis v. Butler*, 154 Cal. 623, 98 P. 1047. Also, the precise amount of damage suffered in a fraudulent transaction is not the important factor. The fraud is the essential element, if its victim is only in a worse position by reason thereof. *Munson v. Fishburn*, 183 Cal. 206, 216, 190 P. 808. The proof was that plaintiffs made it clear to defendant in the course of their negotiations that they intended to reconstruct the concrete hall into apartments for rental purposes. This made the exact location of the east line of paramount

importance by reason of the city's requirements.

Defendant knew his statement was untrue. He had acquired the property in March 1941. At that time he learned that the dimensions of the parcel were 300 feet by 102.79 feet and that the easterly line of the lot was flush with the easterly line of the dance hall. Notwithstanding that Alfred knew that the property was no more than  $\frac{2}{3}$  of an acre, he advertised it for sale in a local newspaper as an acre. After the plaintiffs had entered into and occupied the property, defendant visited plaintiffs and, assisted by Mr. Scheel, he again measured the property with the aid of a tape measure and again announced that the length of the lot's 110 feet along the boulevard went seven feet beyond and to the east of the dance hall.

[6-8] Plaintiffs relied upon such representation in making the purchase. Both testified that they believed, and relied upon, the statement. The fact that plaintiffs visited the property and walked over it to make an inspection does not necessarily determine that they depended upon their own observation in determining the area of the lot. From the testimony of plaintiffs and their broken English it is evident that they were not only foreign born, but that they were slightly, if at all, past the status of illiterates. Moreover, it does not require one to be densely ignorant in order to be induced readily to believe that the area of a parcel of ground is 300 feet by 110 feet while in truth its width is only 102.79 feet. No eyes are so trained as to make at a glance an accurate survey or a reliable estimate of such an area of land. *Quarg v. Scher*, 136 Cal. 406, 69 P. 96. Upon this lot, two houses stood to give added hindrance. So long as plaintiffs placed their faith in the statements of defendant, their walking upon the premises with him does not diminish the significance of his statement as a misrepresentation of the area of the lot. It was defendant's land and it was therefore his duty to know its boundaries before attempting to sell it. Plaintiffs' casual inspection did not relieve defendant of his obligation to speak with accuracy. In the purchase of land the buyer has the absolute right to rely upon the express statement of the seller concerning an existing fact the truth of which is known to the vendor and unknown to the vendee. *Shearer v. Cooper*, Cal.Sup., 134 P.2d 764; *Neff*

*v. Engler*, 205 Cal. 484, 271 P. 744; *Dow v. Swain*, 125 Cal. 674, 58 P. 271. In order for these plaintiffs to have learned independently the exact frontage of the lot, it would have been necessary for them to make use of scientific devices. They made no pretense at a measurement. Having relied upon the word of defendant their walking upon the premises before the purchase did not impair their right gained by such reliance. *French v. Freeman*, 191 Cal. 579, 587, 217 P. 515. The mere fact that the opportunity and means for ascertaining the exact length of the frontage were available to plaintiffs does not defeat their right of recovery. *Brown v. Oxtoby*, 45 Cal.App.2d 702, 706, 114 P.2d 622.

[9,10] It is thus seen that there was substantial proof that the representation was made; that it was material; that it was relied upon; that it was false and was uttered with knowledge of its falsity. Under such circumstances plaintiffs were entitled to rescind. Their success in effecting a rescission would depend only upon the promptness with which they would act and the content of their offer. This is what occurred: Immediately upon being apprised of the exact frontage on Valley Boulevard, plaintiffs consulted with attorney Rich who promptly directed a letter on April 23, 1942, to defendant advising him of the discovery; of the damage plaintiffs would suffer in the sum of \$1,035 by reason of their inability to remodel the dance hall because it is flush with the property line; of the expense plaintiffs had incurred in improving the property and suggested a friendly rescission and payment of their damages. A kindly approach thus attempted to effectuate the settlement of an ugly controversy is not to be discouraged because the first communication did not formally demand a rescission. Indeed, the response there-to gave approval to the friendly overture. In his reply, Mr. Williams, counsel for Hart, six days later, on April 29, stated that he had required more facts from Mr. Hart and requested of Mr. Rich additional information relative (1) to the improvements made by plaintiffs and (2) to the nature of the permit sought at San Gabriel. Two days later, May 1, Rich's letter complied fully with the request of Williams who on May 7 wrote Rich giving the frontage of the lot on Valley Boulevard as 102.79 feet and stated that according

to the written contract plaintiffs had purchased the lot without mention of the width; that defendant had made no representation about the frontage; that if he had done so, such "oral negotiations would be merged" in the writing; that plaintiffs got what they bought and therefore Hart was not liable. Promptly upon receipt of such letter, plaintiffs forwarded to defendant their formal notice of rescission of the purchase because of the misrepresentations. They declared that they renounced all agreements theretofore made regarding the purchase of the lot; that they were moving from the property; that they would make no further payments to defendants or to the Building and Loan Association. They demanded the payment of damages in the sum of \$1,035. Also they offered to reconvey upon receipt of their damages and the cancellation "of all instruments of liability." To such formal notice Williams replied and asked that he be advised of the day plaintiffs would move, that Mr. Hart might inspect the furniture and receive the keys. This recital disposes of the defense of laches. Under the circumstances wherein plaintiffs found themselves on a property they deemed to be that of another and their ready money in his hands their rescission was not tardy; nor did they delay to his detriment.

[11] The notice of rescission substantially complies with the requirements of the law. Sec. 1691, Civil Code. It recites the fraud "explained in prior letters"; denied all liability on the two notes; announced plaintiffs' readiness to deliver the furniture and to reconvey the title of the lot upon condition that plaintiffs be placed in statu quo. The demand for damages in the sum of \$1,035 and other informalities of the notice of rescission were cured by defendant's prior denial of the fraud and his refusal to rescind. *Lanktree v. Spring Mountain Acres, Inc.*, 213 Cal. 362, 366, 2 P.2d 338. Inasmuch as defendant denied the fraud and all liability, the mention in the notice of a sum which was later established to be in ex-

cess of their damage was harmless. The essential thing was that plaintiffs demanded rescission and damages and that thought was conveyed.

[12] The judgment comprehends all the issues. It cancels defendant's deed, the bill of sale and plaintiffs' promissory note in favor of Alfred Hart. It orders the return of the furniture upon defendant's payment of the sums adjudged to be due to plaintiffs.

[13,14] Finally, the amount of the judgment is questioned. The items given in the testimony from which the court derived the finding of the amount of the award are as follows:

(1) Cash paid on purchase price, \$500; (2) payments to the Building and Loan Co., \$140; (3) payments on note to defendant, \$80; (4) title charges, \$93.69; (5) architect for plans to remodel dance hall, \$35; (6) interest on foregoing, \$29.39. This aggregates \$878.08. After subtracting the value of plaintiffs' occupancy as found by the court's inspection of the premises in the sum of \$165, leaves \$713.08 which is in excess of the judgment for \$679.93. Notwithstanding this is less than the total of the above items, yet it contains a charge which is specifically included and must be expressly eliminated. Interest on an unliquidated claim begins to run only from the date of judgment. *Culjak v. Better Built Homes, Inc.*, Cal.App., 137 P.2d 492, filed May 21, 1943.

It is therefore ordered that the judgment against Beatrice O. Hart be reversed with instructions to enter judgment in her favor; that the residuary judgment against Alfred E. Hart be modified in one particular only, to wit: by reducing the amount from \$679.93 to \$650.54, with interest from date of judgment, and as so modified the judgment against him is affirmed. Appellants shall recover their costs on appeal.

W. J. WOOD and McCOMB, JJ., concur.



**BOYD v. OSER.\***

Civ. 6834.

District Court of Appeal, Third District,  
California.

May 28, 1943.

Hearing Granted July 26, 1943.

**1. Wills** Ⓒ6

Income by way of rentals and interest received by spouses after effective date of 1923 amendment to Code section 1401, providing that, on death of either spouse, one-half of community property belongs to surviving spouse and the other one-half is subject to testamentary disposition of decedent, though constituting proceeds of community property theretofore acquired, constituted "after-acquired property", one-half of which was subject to testamentary disposition. Civ.Code, § 1401.

See Words and Phrases, Permanent Edition, for all other definitions of "After-Acquired Property".

**2. Evidence** Ⓒ23(1)

It is common knowledge that the 1923 amendment to Code section 1401 and 1927 amendment to Code section 161a were enacted for purpose of making possible a division of the income of husband and wife for income tax purposes. Civ.Code, §§ 161a, 1401.

**3. Husband and wife** Ⓒ247

In view of purpose of 1923 amendment to Code section 1401, and 1927 amendment to Code section 161a, Legislature would be presumed to have intended to make all subsequently acquired income of spouses subject to terms of the amendments, regardless of its source. Civ.Code, §§ 161a, 1401.

**4. Husband and wife** Ⓒ273(1)

The 1923 amendment to Code section 1401, providing that on death of spouse one-half of community property belongs to surviving spouse and other one-half is subject to testamentary disposition of decedent, affects only the rights of the husband and wife as between themselves, and not the rights of third persons, since creditors are protected by sections 202 and 203 of Probate Code. Civ.Code, § 1401; Probate Code, §§ 202, 203.

**5. Courts** Ⓒ97(6)

Although all proper respect is due decisions of Federal Circuit Courts of Appeals, such decisions are not binding upon

state courts as to construction to be put upon state statutes, but must yield to final decisions of state courts except in so far as construction to be put upon federal statutes is involved.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Robert E. Boyd, as executor, etc., against W. L. Oser, as administrator with the will annexed, etc., to quiet title and for declaratory relief. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Duard F. Geis, of Willows, for appellant.

J. Oscar Goldstein, Burton J. Goldstein, and P. M. Barceloux, all of Chico, for respondent.

**PER CURIAM.**

Appeal by plaintiff from a judgment of the Superior Court of Butte County.

Plaintiff is the executor of the last will and testament of G. F. Waterland, generally known as Frank Waterland. Defendant is the administrator with the will annexed of the estate of Amelia Waterland. Amelia and Frank Waterland were married in 1894, and for many years thereafter operated a candy store in Chico, California, both devoting their time and labor to the business. There were no children of said marriage. From time to time the profits of the candy business were invested in income producing real estate, deeds therefor being taken in Frank Waterland's name. On January 1, 1920, the store was sold and thereafter the parties lived upon the income from their investments, which consisted of rentals collected from their real estate, and interest on occasional loans of cash. Moneys received from these various sources were deposited in bank accounts that also produced income by way of interest.

In May, 1935, Amelia Waterland made a will. Thereby she disposed of a few personal effects and an interest in real estate in San Francisco which was her separate property, provided that the sum of \$50 per month should be paid to a sister as long as said sister should live, then devised the residue of her estate to her husband, naming him as executor. On September 25, 1935, she died. Her will was thereafter admitted to probate and letters testamentary

\* Subsequent opinion 145 P.2d 312.

were issued to her surviving husband. However, before said probate proceedings had been terminated, Frank Waterland died testate, and in November, 1939, plaintiff herein qualified as executor of his last will and testament. He filed an inventory and appraisal, listing therein, as the separate property of said decedent, all of the property acquired by the spouses, including the real estate, furniture and furnishings, promissory notes, cash in five different banks an automobile and a watch.

In January, 1940, respondent, who had been appointed administrator with the will annexed of the estate of Amelia Waterland, filed an amended and supplementary inventory and appraisal, listing therein, as the property of the estate of said Amelia Waterland, an interest in the real property described in the inventory filed in Frank Waterland's estate, together with a one-half interest in certain described personal property consisting of furniture and furnishings of apartment houses located on said lands, and a one-half interest in certain specified bank accounts. He thereupon made demand upon plaintiff to deliver to him moneys in bank amounting to some thirteen thousand dollars. Plaintiff refused to comply with said demand, and filed this action seeking to quiet title to the real property in question, and, in a separate count, asking a declaration of the rights of the respective parties in and to both the real and personal property claimed by the respective parties. Defendant answered, claiming that all of the property, both real and personal, described in plaintiff's complaint, together with the rents, issues and profits thereof acquired by the spouses after their marriage, was subject to the testamentary disposition of Amelia Waterland, and that he was entitled to the possession and control of one-half thereof to the extent necessary to permit him to carry into effect all of the provisions, legacies and bequests set forth in the will of Amelia Waterland.

Trial of the issues presented was had by the court sitting without a jury, and during the course thereof defendant conceded that no portion of the community property acquired by the spouses prior to July 16, 1923, the effective date of the amendment of section 1401 of the Civil Code, St.1923, p. 30 (now sec. 201 of the Prob.Code), was subject to administration in the estate of the deceased wife. But as to moneys in bank accounts, all of which accounts were opened after July 16, 1923,

and, with accumulated interest, amounted to \$24,323.75, he contended that same constituted community property, one-half of which was subject to the testamentary disposition of the wife and was disposed of by her in her said will. At the conclusion of the trial the court made findings of fact in which it found that with the exception of one piece of real estate, all the real property in controversy was the separate estate of Frank Waterland at the time of his death. As to the excepted piece, title to which had been acquired in 1929 in the names of both Frank and Amelia Waterland, it was found that same was the community property of the spouses at the time of the death of the wife, and that one-half thereof was subject to the testamentary disposition of the wife. And as to the personalty the court found that up to the time of the death of Amelia Waterland, Frank Waterland "collected rents and income from the community real estate which was owned by said husband and wife as community property on the 16th day of July, 1923, and deposited said rentals and income in bank accounts, and withdrew and redeposited and reinvested the same. That all of the personal and real property described in this finding had its source in said rentals and income so deposited, redeposited and reinvested, and none of it had its source in the earnings of said husband and wife after the 16th day of July, 1923. That none of said real or personal property consists of the original rentals or income from said community real estate so owned on the 16th day of July, 1923, by said husband and wife or the original deposits of the said rentals and income so received from said property. That the real and personal property referred to in this finding is specifically described as follows:" Then followed a description of the excepted parcel of real property above mentioned, and moneys in banks amounting to \$24,323.75, a promissory note for \$500 and the Buick sedan. Judgment followed quieting the title of defendant to an undivided one-half interest in the property found subject to the testamentary disposition of the wife, and quieting plaintiff's title to the remainder.

A motion for a new trial made by plaintiff was denied. This appeal followed, the questions propounded by appellant being whether Amelia Waterland had a right to bequeath one-half of the rentals received after the effective date of the 1923 amendment to section 1401 of the Civil Code, de-

rived from community real property acquired prior to said date; and, if said rentals were not subject to the wife's testamentary disposition, whether the deposit of such rentals in savings account or other transmutation in the form thereof, rendered said community property, in its new form, subject to the wife's power of disposition by will. The latter question results apparently from the written opinion of the trial court filed prior to its judgment, in which it was stated that if, after July 16, 1923, community property which was owned on that date was reinvested, the title to the specific community property then acquired would be subject to the amendment (citing *In re Estate of Phillips*, 203 Cal. 106, 113, 263 P. 1017); that income from community property owned on July 16, 1923, which had been collected and invested in another form of community property after said date was subject to the amendment of section 1401 of the Civil Code; and that the collection of rentals and their deposit in banks constituted a reinvestment which rendered said bank accounts subject to the wife's right of testamentary disposition.

Respondent, in his brief, contends that whether reinvested or not, the rents, income and profits which were acquired subsequent to 1923 must be held to be after-acquired property subject to the wife's right of testamentary disposition, such as is referred to in *Re Estate of Phillips*, supra, and *Sexton v. Daly*, 95 Cal.App. 754, 273 P. 109; that such income was not and could not have been in existence at the date of the amendment of section 1401, and that as subsequently acquired property it was subject to the provisions of that section.

Except in so far as it may have been involved in *Henry v. Hibernia Savings & Loan Soc.*, 5 Cal.App.2d 141, 42 P.2d 395, 396, the question here presented appears not to have been directly decided by the courts of this state. In that case moneys which were the community property of Annie Henry and her husband, P. W. Henry, were deposited with defendant Bank, in the wife's name. When Annie Henry was 84 years old and nearly blind she went to said bank with her son, and transferred said moneys to a joint account in the names of Annie Henry and William R. Henry, the son, without the knowledge of the husband. Thereafter Annie Henry died and her husband soon followed her in death. Plaintiff then brought suit against the bank and the administratrix of his father's estate to col-

lect the moneys in the joint account, claiming that they were the separate property of the wife, and that she had given them to him prior to her death. The trial court found that said money was community property and therefore a part of the estate of the deceased husband. On appeal the court said that of the community funds on deposit, all had been deposited prior to the effective date of section 161a of the Civil Code in 1927, and that all but \$500 prior to the effective date of the 1923 amendment to section 1401 of the Civil Code (Prob.Code, sec. 201). It said: "All that acquired prior to 1923, with the increase thereof represented by the interest paid by the bank, vested in the husband, and that portion the wife did not have power to devise or give away. *Riley v. Gordon*, 137 Cal.App. 311, 314, 30 P.2d 617. As to that portion acquired subsequent to 1923, but prior to the 1927 amendment to section 161a of the Civil Code, \* \* \* it is clear that the title also vested in the husband (*McKay v. Lauriston*, 204 Cal. 557, 565, 269 P. 519), subject, however, to the wife's testamentary disposition of one-half thereof. \* \* \* To restate the foregoing—none of the community property acquired prior to the 1923 amendment was subject to the testamentary disposition of the wife and the title to none of that acquired prior to the 1927 amendment was vested in her. Hence, when, in 1928, she attempted to make a gift of the entire fund to the appellant, she assumed control over property in which she had no vested interest and in which she did not acquire title by operation of law as was the case in *Lynch v. Lynch*, 207 Cal. 582, 586, 279 P. 653." In the trial court no question of the wife's right to dispose of community property by gift or will was in issue; but on appeal the question of the effect of the wife's will was raised and the court then held, as above stated, that the part of the money acquired prior to 1923, with the increase thereof represented by the interest paid by the bank, vested in the husband. As to the sum of \$500 deposited after 1923 a retrial was ordered.

[1] Whether, by its statement that the portion acquired prior to 1923 with the increase thereof represented by interest paid by the bank vested in the husband, the court intended to include interest accrued after 1923 is not clear. Its citation of *Riley v. Gordon*, supra, as authority for its holding indicates that it did not, as that case did not involve such a question. If the court



did mean that interest earned after 1923 vested in the husband so as to preclude the testamentary disposition of any part thereof by the wife, we do not agree with such conclusion, but are of the opinion that income by way of rentals and interest received by the spouses after 1923, though the proceeds of community property theretofore acquired, constituted "after acquired property" within the language of the Supreme Court in *Re Estate of Phillips*, supra, one-half of which was subject to the testamentary disposition of the wife.

Appellant cites *McKay v. Lauriston*, supra, and *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477, to the effect that the amendment of section 1401 of the Civil Code did not give the wife testamentary disposition of community property acquired prior to 1923. But those cases did not involve the question presented here; and the court did hold therein that the rights of the spouses are determined by the law in force at the time of the acquisition of community property, and did not hold that rentals or other forms of income acquired after the effective date of the amendment are not "after acquired" property subject to its terms.

[2,3] Since it is a matter of common knowledge that the amendments of 1923 and 1927 were enacted for the purpose of making possible a division of the income of husband and wife for income tax purposes, the presumption is that the Legislature intended to make all subsequently acquired income subject to the terms of the amendments, regardless of its source. Income from previously acquired community property is community property, and obviously that received after the effective date of the amendment of section 1401 cannot be said to have been previously "acquired."

We are cited to no authority holding that to so provide was beyond the power of the Legislature. In *re Estate of Phillips*, 203 Cal. 106, 113, 263 P. 1017, 1020, the Supreme Court said of section 1401, supra: "As applying to community property acquired after the adoption of said amendment it is, in our opinion, a valid and binding legislative enactment"; and in *Cutting v. Bryan*, 206 Cal. 254, 274 P. 326, 328, *Preston, J.*, in a concurring opinion, expressed the view that the right of the wife in community property acquired since the effective date of section 1401 in 1923, is "a vested one, as is intimated in the recent case of [*In re*] *Estate of Phillips*. \* \* \*

[4] The amendment of section 1401 affects only the rights of the husband and the wife as between themselves, and not the rights of third persons, since creditors are protected by the provisions of sections 202 and 203 of the Probate Code; and the rights of heirs are only what the law makes them. And as to the sacredness of the so-called vested rights of the husband in community property, it has been well said that when, in the regulation of the state's dominant institution, the family, it becomes necessary to alter vested property rights, the benefit to society may well be considered to outweigh the detriment to particular individuals. Numerous cases can be cited upholding statutes enacted under the police power for the public welfare which affect and even destroy vested rights. Zoning laws and our own alien land laws are conspicuous examples. And if, as they purport, the recent amendments of the community property laws were enacted for the benefit of wives and for the greater protection of their interests in community property, the social benefits accruing may well be said to outweigh the detriment that may result to individuals. If they are to be construed as effective only insofar as future earnings of the spouses are concerned, they will give but little protection for years to come, and will be of but slight benefit to wives in being at the time such statutes were enacted.

[5] We should not close this opinion without mention of certain decisions of the United States Circuit Court of Appeals cited and relied upon by appellant, particularly *Hirsch v. United States*, 9 Cir., 62 F.2d 128, and *Rogan v. Delaney*, 9 Cir., 110 F.2d 336, which hold that income received after the effective dates of the amendments above mentioned, from community property previously acquired, shall be taxed as income of the husband under the federal income tax acts. They do not purport to pass upon the rights of the wife to dispose by will of one-half of such community income. Also, while all proper respect is due those decisions, they are not binding upon the courts of the State as to the construction to be put upon the statutes under consideration, which are matters of local law, but must yield to the final decisions of the California courts except in so far as the construction to be put upon federal statutes is involved. Witness *Wardell v. Blum*, 9 Cir., 276 F. 226, overruled in effect by *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197.

Without a share of the moneys claimed to be assets of the estate of Frank Waterland, the estate of Amelia Waterland is insufficient to take care of the bequests under her will, and as between her rights in the community property and the claims of the devisees under the will of Frank Waterland equity supports the claims of respondent to one-half of the community income acquired after 1923.

The judgment is affirmed.



59 Cal.App.2d 83

**PEOPLE v. BEILFUSS.**  
Cr. 3596.

District Court of Appeal, Second District,  
Division 3, California.  
June 7, 1943.

Hearing Denied July 1, 1943.

**1. False pretenses** Ⓒ38  
**Larceny** Ⓒ40(9)

In prosecution for grand theft, alleged variance in that theft was alleged to have been from two persons, while testimony showed that money was delivered to defendant by one or the other only was not "fatal" in view of statute providing that where offense involves commission of private injury, erroneous allegation regarding person injured is not material. Pen. Code, §§ 484, 956.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

**2. False pretenses** Ⓒ38  
**Larceny** Ⓒ40(9)

In prosecution for grand theft, allegation that theft was from two persons was supported by proof showing that although in some instances money was delivered by one or the other of them only, an arrangement existed by which all of the transactions were for their joint account and that they settled the disbursements between themselves from time to time. Pen.Code, § 484.

**3. Criminal law** Ⓒ394

Upon an offer of evidence, court will not inquire into manner in which evidence

was obtained or exclude it because obtained by means of an unlawful search and seizure.

**4. Criminal law** Ⓒ1134(3)

Though accused has a right to recover possession of papers wrongfully taken, his proceedings to do so are not part of criminal case against him and the decision thereon cannot be reviewed on appeal from judgment in criminal case.

**5. Criminal law** Ⓒ589(1)

Trial court did not abuse its discretion in denying accused's motion for continuance of trial for grand theft to enable accused to appeal from municipal court's judgment in action against district attorney to recover possession of papers allegedly taken from accused's office by an unlawful search and seizure. Pen.Code, § 484.

**6. False pretenses** Ⓒ49(1)

Though the offense of obtaining money by false pretenses was by statutory amendment included in definition of theft, it remains subject to statute requiring corroboration of complaining witness' testimony to sustain a conviction. Pen.Code, §§ 484, 1110.

**7. Larceny** Ⓒ55

Larceny by trick and device, though included within statutory definition of theft, is not subject to statute requiring corroboration of complaining witness' testimony to sustain a conviction. Pen.Code, §§ 484, 1110.

**8. False pretenses** Ⓒ20

Whether offense is "larceny" or "obtaining money by false pretenses" depends upon whether victim intended to part with the complete title to property delivered to accused and if victim retained an interest therein, the taking of possession with intent to appropriate to accused's own use is larceny, though possession was voluntarily delivered. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny" and "Obtaining Money By False Pretenses".

**9. Larceny** Ⓒ14(1)

A payment passes to payee a present and complete title to property given in payment so that there is no "larceny". Pen. Code, § 484.

**10. False pretenses** ⇨20, 49(1)

Payment of money to reimburse accused for an expenditure allegedly already made on behalf of payors without any condition attached to payment passed complete title, though made for nonexistent consideration, and established offense of "obtaining money by false pretenses" and not "larceny" so that corroboration of complaining witness' testimony was necessary to sustain conviction for grand theft. Pen. Code, §§ 484, 1110.

**11. False pretenses** ⇨6

A writing that is genuine and contains no false statements of fact cannot be a "false token or writing" within statute requiring corroboration of complaining witness' testimony to sustain conviction of grand theft where money is obtained by false pretenses expressed in language unaccompanied by a false token or writing. Pen. Code, §§ 484, 1110.

See Words and Phrases, Permanent Edition, for all other definitions of "False Token or Writing".

**12. False pretenses** ⇨6

The check by which victims paid to accused the money obtained by false pretenses was not a "false token or writing" within statute requiring corroboration of complaining witness' testimony to sustain conviction of grand theft where money was obtained by false pretenses expressed in language unaccompanied by such token or writing. Pen. Code, §§ 484, 1110.

**13. False pretenses** ⇨49(1)

The "corroboration" of complaining witness' testimony required by statute to sustain conviction of grand theft where money is obtained by false pretenses expressed in language unaccompanied by a false token or writing is corroboration of the making of the pretense. Pen. Code, §§ 484, 1110.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

**14. Larceny** ⇨62(2)

Evidence that accused obtained money to pay taxes on land which he falsely represented belonged to payors with intent to appropriate money to his own use and that land accused subsequently purchased and conveyed to payors was subject to no back taxes established "larceny by trick and device" so that corroboration was not

necessary to sustain conviction of grand theft. Pen. Code, §§ 484, 1110.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny by Trick and Device".

**15. Larceny** ⇨62(2)

Evidence that victims delivered bonds to accused in trust to use proceeds in paying taxes on victims' land on which no taxes were in fact due and that accused appropriated proceeds to his own use was sufficient to show "larceny by trick and device" and sustained conviction of grand theft without corroboration. Pen. Code, §§ 484, 1110.

**16. False pretenses** ⇨49(1)

Evidence that victims made payment to accused to reimburse him for money victims supposed he had previously paid out in their behalf showed the "obtaining of money by false pretenses" and was insufficient to sustain conviction of grand theft where not corroborated. Pen. Code, §§ 484, 1110.

**17. Larceny** ⇨62(2)

Evidence that victims delivered bonds to accused as collateral to enable accused to settle alleged claim against victims and that claim was fictitious established a "larceny by trick and device" sufficient to sustain conviction of grand theft without corroboration. Pen. Code, §§ 484, 1110.

**18. False pretenses** ⇨49(1)

**Larceny** ⇨62(2)

In prosecution for grand theft, the victim's intent as determining whether there was a larceny or the obtaining of money by false pretenses could be established either by direct testimony of victim or by evidence concerning circumstances under which money and property were delivered. Pen. Code, §§ 484, 1110.

**19. False pretenses** ⇨12

**Larceny** ⇨14(1)

In prosecution for grand theft, the intent of the victim who delivered money to accused, whether victim was acting for herself alone or also for another, was the intent to be considered in determining whether there was a larceny or an obtaining of money by false pretenses, since the intent of acting victim would be imputed to the other. Pen. Code, §§ 484, 1110.

**20. False pretenses** ⇨6, 49(1)

A written release of fictitious claim against victims purportedly signed by



fictitious claimants and shown to victims to induce payment to reimburse accused for payment supposedly made by him in settlement of claim was a "false token" sufficient to sustain conviction of grand theft, though complaining witness' testimony as to false pretenses was uncorroborated and existence of release was established only by complaining witness' testimony. Pen.Code, §§ 484, 1110.

See Words and Phrases, Permanent Edition, for all other definitions of "False Token".

## 21. Criminal law ⚡398(2)

"Secondary evidence" of existence of a written release of fictitious claim against victims allegedly shown to victims to induce payment to reimburse accused for payments supposedly made by him in settlement of claim was admissible in prosecution for grand theft, where original release was traced back to possession of accused. Pen.Code, §§ 484, 1110.

See Words and Phrases, Permanent Edition, for all other definitions of "Secondary Evidence".

## 22. Larceny ⚡62(2)

Evidence that victim, by endorsement in the ordinary form, endorsed and delivered to accused a check payable to victim was insufficient to establish a "larceny" so as to sustain conviction of grand theft without corroboration of prosecuting witness' testimony. Pen.Code, §§ 484, 1110.

## 23. False pretenses ⚡49(6)

Testimony concerning circumstances under which bonds were delivered to accused was insufficient to establish the nature of transaction by which stock of the same corporation was obtained by accused who sold it and appropriated the proceeds and hence was insufficient to establish commission of any crime by accused. Pen. Code, § 484.

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

On rehearing. Former opinion amended and judgment of lower court affirmed in part and reversed and remanded for a new trial on certain counts of information.

For former opinion, see 131 P.2d 867.

John S. Cooper, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Marcus R. Brandler, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHAW, Justice pro tem.

The defendant was charged in each of twelve counts of an information with grand theft. He was tried without a jury and convicted on all counts. Later his motion for a new trial was granted as to counts II, VI and XI, and those counts were dismissed. He appeals from the judgments entered on the remaining counts and from an order denying his motion for a new trial.

Each count charges a theft of money from the same persons, Miss Caroline A. Ingersoll and Miss Frances L. Proctor, the amounts and dates being different. The two ladies mentioned were past eighty years of age and had lived together for forty years or more, at the time of their dealings with defendant from which these charges arose. Miss Proctor died before the trial and the testimony in support of the charges was given by Miss Ingersoll only, insofar as it relates to the taking of the money and the statements and representations made by the defendant in connection therewith. Defendant's principal point on this appeal is that the evidence is insufficient to support the convictions. He also contends that there was a variance between the pleading and the proof as to the identity of the persons defrauded, that evidence obtained by a wrongful search of his office and seizure of articles found therein was improperly admitted in evidence and that his motion for a return of this evidence and his motion for a continuance were wrongly denied. We will discuss the contentions last mentioned first.

[1,2] The defendant's point relating to the variance is that in all cases the theft is alleged to have been from two persons, Miss Ingersoll and Miss Proctor, while in some of the cases the testimony shows that the money was delivered to defendant by one or the other of them only. To this argument a sufficient answer is found in this provision of section 956 of the Penal Code: "When an offense involves the commission of \* \* \* a private injury, and is described with sufficient certainty in other respects to identify the act,

an erroneous allegation as to the person injured \* \* \* is not material." People v. Foster, 1926, 198 Cal. 112, 122, 243 P. 667; People v. Cloud, 1929, 100 Cal.App. 792, 794, 281 P. 79. Moreover, there is proof of the allegations as made, for it appears from the testimony of Miss Ingersoll that she and Miss Proctor had an arrangement by which all these transactions were for their joint account, no matter which one paid out the money in the first place, and they settled the disbursements between themselves from time to time.

[3-5] It appears from a showing made by defendant in the trial court that at the time of his original arrest on the charges involved in this case he was taken from his office, where the arrest was made, and that an investigator from the district attorney's office, who accompanied the arresting officer, but had no search warrant, remained behind after defendant's removal, searched through defendant's papers and removed a part of them. Defendant then began in the Los Angeles Municipal Court an action against the district attorney to recover possession of these papers, obtained a speedy trial of that action, and at the commencement of the trial of the case at bar had just received word that the municipal court case had been decided against him, but no judgment had then been entered. He then made a motion for a continuance of the trial of this criminal case to enable him to appeal from the judgment in the municipal court case and have the appeal heard, in the hope of obtaining a reversal of the then as yet unentered judgment. Defendant also presented a petition to the trial court in this case for the return to him of the papers so taken from him, which was denied, the court rejecting his offer to prove the facts above stated. When such papers were offered in evidence he objected to them on the ground that they had been obtained by an unlawful search and seizure, but his objection was overruled and they were received in evidence. His argument here on these matters amounts to a request that we overrule or ignore the decision in People v. Mayen, 1922, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, where it was held that upon an offer of evidence the court will not inquire into the manner in which that evidence was obtained or exclude it because it was obtained by means of an unlawful search and seizure, and that, while the defendant in such a case has

a right to recover possession of papers wrongfully taken, his proceedings to do so are no proper part of the trial of the criminal case against him and the decision thereon cannot be reviewed on appeal from the judgment in the criminal case. This decision was considered and reaffirmed in People v. Gonzales, 1942, 20 Cal.2d 165, 168, 124 P.2d 44, and is immune from attack in this court. Neither of these cases dealt with a motion for a continuance, such as we have here, but we think that, on the showing here made, the court did not abuse its discretion in denying the motion.

[6,7] Defendant's contention on the evidence is that, if any offenses are shown, they are what would formerly have been designated as the obtaining of money by false pretenses, and that the testimony of Miss Ingersoll is not corroborated. Since the 1927 amendment of section 484 of the Penal Code, this sort of crime is now included in the definition of theft. But it still remains subject to the provisions of section 1110 of the Penal Code that "the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances \* \* \*." People v. Fawver, 1938, 29 Cal. App.2d Supp. 775, 777, 77 P.2d 325, and cases there cited. As to some of the counts the People contend that the evidence satisfies the requirements of this section. As to all but Count X, they further contend that the evidence shows a case of larceny by trick and device. While such an offense is within the statutory definition of theft, above mentioned, it is not subject to the provisions of section 1110. People v. Fawver, supra.

[8,9] The distinctions between the offenses of obtaining money by false pretenses and larceny by trick and device were discussed in People v. Delbos, 1905, 146 Cal. 734, 736, 81 P. 131, where the court quoted the following statement from a text book, italicizing it as we do: "In larceny, the owner of the thing has no intention to part with his property therein *to the person taking it*, although he may intend to part with the possession. In false pretenses, the owner does intend to

part with his property in the money or chattel, but it is obtained from him by fraud." The court, after quoting other authorities of which it said, "the meaning is the same", proceeded: "These authors are here speaking of the intention of the owner with respect to the relation which the person then receiving the goods shall bear to them; that is, the owner's intention as to the effect which the delivery of the possession to the defendant shall have on the title. If such delivery is intended to transfer the title absolutely, there is no larceny, for the goods are then no longer his property, and a subsequent theft of them would be a theft of the goods of the person to whom title was thus transferred; and furthermore the defendant would then be invested with the title himself, and could not be guilty of stealing that which is his own." In *People v. Fawver*, supra, 29 Cal.App.2d Supp. 775, 779, 780, 77 P.2d 325, 327, this subject was further discussed and the authorities on the subject were reviewed in some detail. We adopt what was there said as expressing our views. After citing *People v. Delbos*, supra, and many other cases to the same point, the court in *People v. Fawver* said: "The passing of title referred to in the rule is the complete title to the property; although the defendant obtains at the time possession is delivered to him some special interest or right in money or other property delivered, yet, if the victim retains an interest therein, there may be a larceny. Also, if the victim intends title to pass at some time later than the delivery, or upon the fulfillment of some condition not then performed, there may be a larceny. A still more common case is that the victim delivers money or property to the defendant as a loan to enable him to carry out some special plan, or upon some trust, or for some special purpose, as to invest it, or to buy property with it. In all these cases the title does not pass to defendant on delivery to him, and if he then takes what is delivered to him with the intention of appropriating it to his own use, there is a larceny. But this case presents no such facts. Here the money was delivered to defendant, according to the record, 'in advance, as payment on these fittings.' Tinkle had refused to make a loan to defendant or to finance him in the making of molds for these fittings, but on being told that defendant had made the fittings he bought some and paid a part of the price in advance. There was no loan;

no plan or purpose in the mind of Tinkle to which he expected the money to be applied. A payment passes to the payee a present and complete title to the property given in payment. See 48 C.J. 631. If the consideration for which a payment is made is not forthcoming, the payor may rescind and recover what he paid, but that possibility does not alter the original effect of the payment as a transfer of title." To same effect see *People v. Barnett*, 1939, 31 Cal.App.2d 173, 175, 88 P.2d 172.

Bearing the foregoing distinctions in mind, we address ourselves to a consideration of the evidence relating to the individual counts.

#### Count I.

[10] This count charges a theft of \$300 on May 28, 1940. The facts appearing in regard to this are, briefly, that the defendant informed Miss Proctor and Miss Ingersoll—whom we shall hereinafter refer to as "the victims" when it is necessary to mention them conjointly—that an option which they had given to one Van Stone on some New Mexico land had been bought by another man, and that this transferee claimed he had been defrauded and wanted \$300 to reimburse him for what he had paid for the option or otherwise he might sue the victims. Defendant further said he had paid \$300 to this transferee to get the option and had then destroyed it and he demanded of the victims repayment of this \$300. They paid him \$300 in response to this demand, and this payment is the subject of count I. We find no direct evidence of the falsity of the statements thus made by defendant to the victims as a reason for the payment of the \$300 to him by them, although the very nature of those statements is such as to cause anyone less trustful and confiding than the victims appear to have been to question them. But however much we may doubt the reality of the transaction thus narrated to the victims, and even assuming its nonexistence, we are unable to see in the evidence anything but the obtaining of money by false pretenses. The victims paid the money to defendant to reimburse him for an expenditure he claimed already to have made in their behalf; there was no condition attached to the payment, nothing more for defendant to do in the matter, no plan or purpose in the minds of the victims to which the money was to be applied. As far as their intentions



were concerned, the transaction was closed by the payment. The payment, though made for a nonexistent consideration, was as effective to pass a present and complete title to the money as was the payment for nonexistent pipe fittings in *People v. Fawver*, supra, 1938, 29 Cal.App.2d Supp. 775, 77 P.2d 325. See, also, *People v. Shearer*, 1927, 83 Cal.App. 321, 331, 332, 256 P. 611.

[11,12] The money involved in this count was paid to defendant by a check, which was introduced in evidence. The People argue that this is sufficient to satisfy section 1110, Penal Code, as a false token or writing. The cases contain no clear definitions of these terms, but to bring an object within either, there must, of necessity, be something false about it. A writing which is genuine and contains no false statements of fact cannot be a "false token or writing." The check is, therefore, excluded from this category. *People v. Carter*, 1933, 131 Cal.App. 177, 184, 21 P.2d 129; see, also, *People v. Wynn*, 1941, 44 Cal.App.2d 723, 728, 112 P.2d 979; *People v. Payton*, 1939, 36 Cal. App.2d 41, 53, 96 P.2d 991; *People v. Pearson*, 1924, 69 Cal.App. 524, 531, 231 P. 612. *People v. Harrman*, 1940, 40 Cal. App.2d 487, 492, 104 P.2d 1063, 1065, cited by respondent, does not hold to the contrary, for it specifically declares that the writing there considered was not used "for the purpose suggested in section 1110".

[13] It is also argued that there is sufficient corroboration of Miss Ingersoll. But the corroboration required by section 1110 is of the making of the pretense. *People v. Walker*, 1924, 69 Cal.App. 475, 496, 231 P. 572. We find no corroboration going to this subject.

### Count III.

Counts III, IV, V, VII, VIII, IX and X revolve about defendant's dealings with the victims in regard to some land in Fresno County. About the latter part of September or the first part of October, 1940, defendant said to them that he had discovered some valuable oil land in Fresno County which belonged to them but was incumbered by taxes and assessments amounting to \$6,000 or \$7,000, and that it was so valuable they ought to try to get it back; and he offered to attend to it for them. He at first said there were  $3\frac{1}{4}$  acres of this land, but later said there were  $4\frac{1}{4}$  acres. They had not heard of

this land before, and said they could not put up all the money necessary but would allow him "to go after it if he was willing to put up the extra money that was necessary." About the middle of November, 1940, defendant inquired of Murray Blank, who had a real estate subdivision in Fresno County, if any of that acreage was available, and on November 16, 1940, defendant paid Blank \$320 and for that sum received a deed conveying to him  $4\frac{1}{4}$  acres of land in Fresno County. Blank had owned this land for about a year before defendant bought it, and testified that he had paid the taxes on it, that they amounted to thirty to thirty-five cents per acre, and that there were no back taxes on it when he sold it to defendant. Defendant then executed two deeds, dated November 27, 1940, by which he conveyed to each of the victims approximately half in area of the land he had thus acquired from Blank, had these deeds recorded and then gave them to the victims, saying that he thought it would be better to get the Fresno County land in his own name and then transfer it to them.

[14] About October 8, 1940, Miss Ingersoll gave defendant \$1,000 in the form of a cashier's check which she obtained from a bank by putting up three bonds as security. This is the subject matter of count III. The conversation at the time she gave him this check was "that he was to use it in paying those taxes. Q. Who said that? A. Well, that is what he claimed I should pay him, he wanted to use that much money at the time. Q. On this Fresno County land? A. Yes sir, it was to go toward the taxes, toward the redemption of the land \* \* \* it was an advance payment on what he would have to pay toward redeeming the Fresno land." This check was cashed by defendant. This evidence is sufficient to show a larceny by trick and device, under the rules above stated. Miss Ingersoll did not intend to pass to defendant an absolute, or indeed any, title to the money so given to him; there was a special plan or purpose in her mind to which she expected the money to be applied, that is, the redemption of this Fresno County land, which she supposed the victims owned, from taxes. She was tricked into making this payment in two ways; first, there was then no land owned by them, and second, the land which defendant later professed as theirs was subject to no back taxes.

Plainly the defendant had, at the time the money was delivered to him, the intention of appropriating it to his own use, and the case is one of larceny rather than false pretenses.

#### Count IV.

[15] On November 14, 1940, Miss Ingersoll, according to her testimony, turned over to defendant two bonds for which he told her he got \$1,385. Other evidence shows that the next day after these bonds were delivered to defendant they were pledged to a bank to secure his note, and that they were later sold for \$1,395.62, defendant's note was paid with part of the proceeds and the balance was turned over to him. Just before testifying to the delivery of these bonds, Miss Ingersoll testified:

"Q. By Mr. Hinshaw: Now, after you had given Mr. Beilfuss this \$1000.00, [the subject of Count III] did you have any further conversation with him about this Fresno land at any other date? A. Yes, sir, he would come every little while and want some more money.

"Q. And did he tell you what he wanted the money for? A. Well, it was to pay these men that had paid the taxes, the redemption.

"Q. Did he ever tell you how much the total amount was? A. He did at the last, yes. It was, in addition to what we had paid him, he claimed that he had furnished six thousand and some odd dollars. I can't remember how much." Just after testifying to the delivery of the bonds, she further testified: "Q. What were the circumstances of your turning those bonds over to Mr. Beilfuss? A. Well, he claimed that we owed him some money, he had to use this money to pay on the taxes \* \* \*. I asked him for the confirmation slips. He didn't tell me where he sold them, but he kept saying he would bring those confirmation slips, but he didn't do it." This testimony is somewhat ambiguous, but it is capable of the construction, which the trial court evidently put upon it, that these bonds were delivered to defendant in trust to use the proceeds in paying the taxes on the Fresno land. We must apply the same rules here as in case of count III already discussed and reach the same conclusion.

#### Count V.

On November 23, 1940, Miss Ingersoll delivered some stock to defendant, which

he sold for \$723.94, keeping the money. The general statement already quoted under count IV that "he would come every little while and want some more money \* \* \* to pay these men that had paid the taxes, the redemption" is applicable to this transaction, and leads to the same conclusion announced on count IV.

#### Count VII.

[16] On January 2, 1941, Miss Proctor gave defendant a check for \$350. The testimony regarding this is: "he claimed that she owed it, or something. I don't remember about that \* \* \*. Q. \* \* \* what was said about that? A. Well, that is 350 that was still due him on the land. \* \* \* It was the Fresno land \* \* \* that we had cleared up all the other expenses except that \$350.00, and that was for his expenses in some phase of it—he had it itemized." We can make of this nothing more than an absolute payment to defendant, intended by the victims to reimburse him for money they supposed he had previously paid out in their behalf. This count is the same as count I in principle and the same conclusion must be reached regarding it.

#### Count VIII.

[17] After the victims received the deeds to the Fresno County land, they executed an option on it to a man named Evans, who took the option away with him. Miss Ingersoll had previously talked with defendant by telephone regarding the matter and he had said that Evans would bring out an option prepared by defendant. A little later defendant came to see them and said Evans had substituted another option for the one drawn by defendant and changed the number of acres called for by it to 14½ instead of 4½ that they owned and had then sold it to two men for \$18,500, and that these men demanded that the victims either convey 14½ acres or return to the men the \$18,500 paid by them for the option, and threatened to sue the victims if this was not done. The victims naturally did not know what to do in this situation. They told defendant they could not pay \$18,500, and he then came forward with a solution; he said, according to Miss Ingersoll, that "if we could furnish \$3,500 that he could raise \$15,000 and he felt somewhat responsible \* \* \* and that he wanted to try to help us all that he could \* \* \* there was nothing to do but try

to pay that \$18,500." They gave him six bonds as collateral to furnish the \$3,500, Miss Proctor furnishing four and Miss Ingersoll two. Miss Ingersoll testified regarding this matter, "we simply delivered our bonds as collateral for something that he would borrow at the bank, but he said he would try to keep those bonds simply as collateral so that they could be returned to us later, instead of sold." Defendant borrowed money on the bonds and then sold them and realized from them, net after furnishing Miss Ingersoll \$1,000 to pay off a lien on her bonds, a sum in excess of \$2,900 (stated in this count to be \$2,921.51). No question is raised about the sufficiency of the evidence to show the fictitious nature of the claim which, according to the defendant, was being asserted against the victims and was to be settled by means of the dealings involved in this count, but we have examined it and find it sufficient on this point. Here again there is evidence that the victims did not intend to pass the complete title to these bonds or their proceeds to the defendant, but intended them to be applied to a special purpose, and that defendant intended, when he received them, to appropriate them to his own use. A larceny by trick and device sufficiently appears.

[18, 19] Defendant argues, in connection with this count, as well as the others, that Miss Proctor's state of mind cannot be shown by the testimony of Miss Ingersoll and that for this reason the evidence is insufficient. While the intent of the victim is one of the matters to be proved in a case of this kind, and while direct testimony of such victim is receivable in proof of that intent, yet such testimony is not the only possible proof of intent, but in this, as in other cases, intent may be shown circumstantially. Here Miss Ingersoll herself delivered a part of the property obtained by defendant, and she could directly testify to her own intent. She was present when Miss Proctor delivered the property obtained from her, and she could and did testify to the circumstances attending that transaction. Her testimony was sufficient to support the jury's implied finding regarding Miss Proctor's intent. In case of all the other counts which we affirm, Miss Ingersoll herself made all the payments, and her intent, to which she testified, was the intent to be considered, whether she was acting for herself alone or also for Miss Proctor. In the latter

case Miss Ingersoll's intent would be imputed to Miss Proctor.

### Count IX.

At the time the victims made the payment discussed under count VIII they gave defendant a promissory note for \$15,000 for the money he was supposed to be advancing. On February 14, 1941, Miss Ingersoll paid the defendant \$500, "on what he said we owed him." This is another case of an ordinary payment and the offense proved is the obtaining of money by false pretenses. The People urgently contend that because this payment was made for a fictitious consideration, a case of larceny by trick and device is shown. We have already stated our reasons for disagreeing with this contention.

[20] However, the People also contend that in this transaction there was a false token or writing accompanying the false pretense and we think this contention must be sustained. This payment grew out of the transaction we have described under Count VIII. In the course of that transaction, on February 4, 1941, when the \$15,000 note was signed, and before the payment involved in this count was made, defendant handed to Miss Ingersoll a writing which purported to be signed by the two men who were making the claim against the victims, and to release the victims from the claim supposed to be so asserted. Since the evidence shows that this whole claim was a fiction, and even that there were no such persons known to defendant as those named by him as claimants, this paper is undoubtedly a false token. *People v. Wynn*, supra, 1941, 44 Cal.App.2d 723, 728, 112 P.2d 979; *People v. Payton*, supra, 1939, 36 Cal.App.2d 41, 53, 96 P.2d 991; *People v. Pearson*, supra, 1924, 69 Cal.App. 524, 531, 231 P. 612; *People v. Fleshman*, 1915, 26 Cal. App. 788, 148 P. 805. This release, after it was handed to Miss Ingersoll, was copied by her, and then handed back to defendant by her. She testified to the correctness of her copy and it was admitted in evidence.

[21] The proof of this false token was made only by the testimony of Miss Ingersoll herself, but this fact does not prevent it from satisfying the purpose of section 1110 of the Penal Code. In *People v. Martin*, 1894, 102 Cal. 558, 564, 36 P. 952, the Supreme Court raised, without decid-



ing, the question whether corroborating circumstances in regard to a false pretense may be shown by the testimony of the same witness who testified directly to the false pretense. We need not decide it here, for section 1110 requires corroboration only if the false pretense is "unaccompanied by a false token or writing." Under this provision the witness who testifies to the pretense may also testify to the false token or writing accompanying it and needs no corroboration if he does so. Here, secondary evidence of the contents of the release was proper because it was traced back into the possession of the defendant. *People v. Powell*, 1925, 71 Cal.App. 500, 515, 236 P. 311.

#### Count X.

[22] On April 3, 1941, Miss Ingersoll gave defendant \$890.55 by endorsing to him a check for that amount payable to her. She had no recollection of her conversation with him at the time. The endorsement was in the ordinary form which transfers title, and we cannot regard the evidence on this count as sufficient to show anything other than such a transfer. No conditions or qualifications to the transfer appear and a case of larceny is not made out.

#### Count XII.

[23] About July 10, 1941, defendant stated to the victims that he had run across some property that belonged to Evans—the same man who had obtained from them the option above mentioned in the discussion of count VIII—that he could get a lien on and that he had to supply some money to somebody who had investigated the matter and that if he could get hold of that land he could sell it for a large amount of money, and that this land was very valuable. On the same day Miss Proctor sold some shares of common stock of Pacific Southern Investors for \$438.78 and caused the proceeds to be paid to defendant. She had previously handed the stock to defendant for delivery to the brokers who made the sale and at that time defendant gave her a receipt for this stock. While the date of this transaction differs from that alleged in count XII by four days, the amount is the same. The People assert

and the defendant concedes that count XII is aimed at this transaction; hence we so regard it. Miss Ingersoll testified that it was "upon the strength of" the above mentioned statement of defendant and her belief in it "that the bonds were turned over, of the Pacific Southern Investors." The defendant admits receiving and selling the stock described in his receipt, but says the proceeds were applied to the price of land sold by him to the victims. This evidence fails to show that the cause inducing Miss Proctor to turn over to defendant the property, the proceeds of which he ultimately received, was his statements above mentioned. Miss Ingersoll testified only to bonds turned over by reason of such representations. The property sold was stock of the same corporation. Hence we are left in the dark as to the nature of the transaction by which defendant got the proceeds of the stock and cannot say that a crime was committed by defendant. For this reason we do not consider the People's contention that defendant's receipt was a false token within the meaning of section 1110 of the Penal Code. If the differing descriptions refer to the same property, that can be shown on another trial. It cannot be assumed, without evidence, that such was the fact.

The defendant testified that all his dealings with the victims were mere sales of land or interests therein to them and the payments they made to him were on account of the prices due him on such sales, and denied Miss Ingersoll's testimony of his statements so far as it showed a different state of facts. But this merely raised a conflict in the evidence and, on familiar rules, the trial court's decision in that matter is binding upon us.

The judgments on counts III, IV, V, VIII, and IX, and the order denying a new trial on those counts are affirmed. The judgments on counts I, VII, X and XII, and the order denying a new trial on those counts are reversed and the cause is remanded for a new trial on those counts.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting. SCHAUER, J., not participating.

58 Cal.App.2d 837

**PEOPLE v. PATTERSON.**  
**Cr. 1824.**

District Court of Appeal, Third District,  
California.

May 27, 1943.

See Words and Phrases, Permanent  
Edition, for all other definitions of  
"Miscarriage of Justice".

**5. Criminal law**  $\S$  553

Jury are not bound to accept or reject  
testimony of any particular witnesses.

**6. Witnesses**  $\S$  344(2)

In prosecution for assault with deadly  
weapon, testimony regarding a previous  
fight in which complaining witness partici-  
pated was properly excluded as relating  
to specific occurrences where offered on  
issue of reputation of complaining witness  
for peace and quiet, even if self-defense  
was properly in issue and evidence was of  
such nature as to create doubt as to wheth-  
er complaining witness or accused was  
aggressor. Pen.Code,  $\S$  245.

**7. Assault and battery**  $\S$  95

In prosecution for assault with deadly  
weapon in which defense throughout great-  
er part of trial was that accused was not  
person who stabbed complaining witness  
and evidence to such effect was introduced  
by accused, issue of self-defense could not  
properly be considered by jury as being  
in conflict with such theory. Pen.Code,  $\S$   
245.

**1. Jury**  $\S$  75(1)

Trial court's action in excusing greater  
number of veniremen on account of the  
great distances which they resided from  
county seat, and because of wear and tear  
that would result to automobile tires in  
traveling to place of trial, was not abuse  
of discretion and did not prevent accused  
from receiving a "fair and impartial trial"  
or result in a trial by a jury composed of  
"particular individuals" because most of  
jurors resided at or near county seat.  
Const. art. 1,  $\S$  7.

See Words and Phrases, Permanent  
Edition, for all other definitions of  
"Fair and Impartial Trial" and "Particu-  
lar Individuals".

**2. Criminal law**  $\S$  304(2)

The shortage of rubber needed for  
automobile tires during 1942 and 1943 is  
common knowledge.

**3. Criminal law**  $\S$  1137(1)

Even if trial judge acted arbitrarily in  
excusing certain veniremen because of the  
great distances which they resided from  
county seat and to prevent wear and tear  
on their automobile tires, accused was in  
no position to complain thereof on appeal  
where he had failed to exhaust his peremp-  
tory challenges and record showed that he  
had declared a number of times during  
proceedings that he was satisfied with jury,  
and where record did not indicate that any  
objection was made thereto. Const. art. 1,  
 $\S$  7.

**4. Assault and battery**  $\S$  92  
**Criminal law**  $\S$  1186(4)

Testimony of complaining witness that  
while fighting accused he remembered feel-  
ing accused hit him in back with a knife,  
and testimony of several witnesses as to  
accused's statements that he had stabbed  
somebody, was sufficient to sustain convic-  
tion for assault with deadly weapon, and  
verdict could not be construed as "miscar-  
riage of justice" within constitutional pro-  
vision. Pen.Code,  $\S$  245; Const. art. 6,  $\S$   
41½.

Appeal from Superior Court, Butte  
County; Harry Deirup, Judge.

James Patterson was convicted of assault  
by means of force likely to produce great  
bodily injury, and he appeals.

Affirmed.

Albert King, of Oroville, for appellant.

Robert W. Kenny, Atty. Gen., and T. G.  
Negrich, Deputy Atty. Gen., for respond-  
ent.

THOMPSON, Justice.

Defendant was charged by information  
with the commission of an unlawful assault  
upon one Ted Carter by means of force  
likely to produce great bodily injury. The  
crime charged constitutes a violation of  
section 245 of the Penal Code. After trial  
by jury the verdict of guilty was returned  
and this appeal is from the judgment of  
conviction.

It is contended that the judgment of con-  
viction must be reversed for the following  
reasons: Denial to defendant of a fair and  
impartial jury trial resulting from an arbi-

trary restriction of the veniremen to the Oroville section of the vicinage, that the verdict of the jury is contrary to law, that the evidence is insufficient to support the verdict, and that the court erred in certain rulings in regard to the admission of evidence.

The circumstances connected with the assault upon Ted Carter which resulted in his receiving a number of wounds inflicted with a knife, may be fairly summarized as follows:

All parties concerned with the affray which resulted in the commission of the assault in question were, on the evening of October 4, 1942, present at an establishment whose business was the sale for consumption on the premises of light wines and beer. This cafe is known as the Log Cabin and is located in the city of Chico.

The defendant and his party, which included his wife and his daughter, arrived at the Log Cabin Cafe sometime shortly after five o'clock. The members of this group ordered and consumed some beer, and the defendant and Mrs. Patterson also amused themselves for the first half or three quarters of an hour by playing a slot machine. The complaining witness, Ted Carter, a soldier who was at the time of the assault in question stationed at the Army Flying School at Chico, entered the cafe sometime after the arrival of the defendant and his party. Shortly thereafter Carter met the defendant, the defendant's wife, and their thirteen-year-old daughter. Some of the patrons of the cafe were dancing and Carter had two dances with the defendant's wife and two dances with the daughter. At about this time, according to the testimony of witnesses, the defendant's wife slapped Carter in the face with her purse, and immediately thereafter, as he was seated at the bar with his back turned toward her, the defendant's wife broke a beer bottle or glass over his head and was proceeding to jab him in the back of the head or neck with a broken portion thereof when interrupted by a bystander. This action on the part of defendant's wife was explained by her testimony and the testimony of the daughter to the effect that Carter had proposed to both of them, separately, that they accompany him outside of the cafe. The action of defendant's wife in breaking the glass or bottle over Carter's head resulted in an inconsequential fist fight between Carter and the defendant. This fight was soon stopped by bystanders

and apparently neither the defendant nor Carter received any injury. The defendant then left the barroom of the cafe and proceeded through the entrance door to the outside of the building. In a few moments, according to the testimony of one of the witnesses, the defendant reappeared at the entrance door of the barroom and in loud and vulgar language challenged Carter and anyone else present to come outside and fight. Carter left the barroom and did go outside a short time after the defendant challenged him to fight, and immediately thereafter the fight between them was resumed. The testimony is in conflict as to just which parties were involved in this second affray, but it is admitted that Carter and the defendant were fighting one another and that it was during this time that Carter slumped to the ground with five knife wounds in his back. These knife wounds varied from six to eight inches in length and in some instances were three-quarters of an inch in depth, penetrating the substantia tissue. Carter's injuries required his hospitalization for approximately ten days.

Carter testified that Patterson preceded him in leaving the cafe and that Patterson was outside waiting for him as he and a soldier friend, Zutter, walked out of the door. Carter's testimony in part is as follows:

"A. We walked out the door and that is when the fight started outside.

"Q. Was Mr. Patterson out there? A. Yes.

"Q. And, in that respect, how did that fight start? A. I think he said he was—that he could lick anybody that was in there and added a few names to it.

"Q. He said he could lick anybody that was in there, and used some vile words? A. Yes sir. \* \* \*

"Q. Now then, do you recall what happened in the fight? A. Well, some of it, yes.

"Q. What do you recall? A. I know we were fighting there, and I remember once of when I went by him, I remember of feeling him hit me in the back with a knife, or something, I remember that.

"Q. You felt some pain in your back? A. Yes.

"Q. By the way, in that fight, from what you stated you were cut up, were you? A. Yes. \* \* \*



"Q. Did you have any weapons of any kind on your person? A. No sir.

"Q. Did you use anything in this fight other than your fists? A. No sir.

"Q. I want to ask you about the fight itself, outside at the time you were cut. Do you remember anyone else being in that fight and fighting against you other than Mr. Patterson at that time? A. No, I do not.

"Q. Just the two of you, that is your recollection? A. Yes sir."

Mr. Zutter, Carter's friend, testified that the defendant, his wife Mrs. Patterson, and Mr. Robbins, a friend of the defendant, were all three fighting with Carter, that as he made his way around an automobile and grabbed Carter that Carter said to him that somebody had stabbed him; that Carter then fell to the ground and Zutter dragged him out from between the automobiles where the fight had taken place.

Mr. Garrison, a ranch hand, who stood at the door of the cafe and witnessed the fight, testified that at one time the defendant, his wife, Mr. Robbins, and Carter were all in a huddle together, and that he didn't believe anyone was being hurt as they were all so drunk.

Shortly after the fight was ended the defendant and Robbins left the scene of the affray in an automobile belonging to Robbins and the defendant was driven to his home. As they were leaving the cafe premises they were observed by two young men who had been attracted to the scene by observing the complaining witness, Carter, as he lay injured on the ground. These young men sat in their parked car located near the one belonging to Robbins. According to their testimony, they overheard the defendant tell Robbins to get him away from there as he had knifed the soldier. The testimony of Joe Shreve, one of the young men present on the occasion, is as follows:

"Q. And you and your friend sat right in the car did you? A. Yes, we did at first.

"Q. At first? A. Yes sir.

"Q. Now then, did you see the defendant in this case, Mr. Patterson and a man named John Robbins that night? A. Yes. They were standing right in front of the door of the Log Cabin Inn.

"Q. And did you hear any statement made by either of them? A. Not there. It seems as though they were fighting with some woman there trying to get her to get

in the car or something, I couldn't say for sure. \* \* \*

"Q. Did you later hear either one of them say anything? A. Yes.

"Q. What did you hear? A. When they came past our car there I heard them talking.

"Q. You heard them talking? A. Yes.

"Q. Did you hear Mr. Patterson say anything? A. Yes.

"Q. What did he say? A. He said, 'Get me out of here, I sure as Hell knifed that S—— of a B——.'

"Q. He said 'Get me out of here, I sure as Hell knifed that s—— of a b——'? A. Yes sir.

"Q. There is no question about that in your mind? A. No question about it.

"Q. Who did he address those remarks to? A. To Mr. Robbins.

"Q. And that was as they came by the car here? A. Yes."

Earl Rorden, the other young man present, testified, as did young Shreve, that he overheard one of the two men say to the other that "I sure knifed Hell out of that s—— of a b——" and "let us get out of here," but Rorden could not say which of the two men had made the statement, although he did identify Robbins as one of the two men present when he later saw him in the light after Robbins had returned to the Log Cabin.

Rorden and Shreve followed the defendant and Robbins as they left the cafe premises in the car belonging to Robbins; and procured the license number of the car by the time the defendant had reached his home. Rorden and Shreve then returned to the Log Cabin Cafe.

Mrs. Marie Lewis, a witness for the prosecution, and a daughter of Mr. John Robbins, also testified that she heard the defendant make the statement that he had stabbed somebody. The Robbins' home is located adjacent to the home of defendant, with only a vacant lot intervening, and Mrs. Lewis testified that on the evening of the assault in question she saw her father drive up in front of defendant's home and observed the defendant alight from the car. She also testified that her attention had been directed to the home of defendant because of the commotion that was taking place, and that she heard defendant say that he had knifed somebody. She further testified that she walked over to where

the defendant and her father were talking and that shortly after that when the defendant's wife, Mrs. Patterson, and their little girl were present, she heard the defendant repeat the statement that he had stabbed somebody.

Mr. Larry Gillick, Undersheriff of Butte County, testified that the defendant on October 5, 1942, made a voluntary admission. Sheriff Taylor and the District Attorney were present when that statement was made. The defendant admitted that an affray occurred between himself and Ted Carter outside of the Log Cabin Cafe and that he cut the prosecuting witness several times with a knife. Gillick testified in part:

"He [the defendant] said, 'I hit the soldier boy and followed him out there,' and the soldier boy got up and hit him and knocked him down, and he said, 'I was not going to stand by and get beaten up by someone bigger than myself,' and he said 'I took my knife' and that \* \* \* as he would come at him he would side step him and swing at him as he went by, and he said the first couple of times, he said he thought he missed him, but he said he must have hit him four or five times.

"Q. Was it at time \* \* \* as he went by \* \* \* he swung at him with a knife? A. Yes. He said then that he left, and that when he left the soldier boy was laying face down between two parked automobiles, and he got in the car with John Robbins and told John Robbins that he had used a knife on a man."

[1,2] The defendant contends that he was denied the right of a fair and impartial trial by jury, because the trial court excused several veniremen from the panel on account of the great distances at which they resided from the county seat, and he was therefore forced to trial only by jurors who resided at or near Oroville.

Article 1, section 7, it is true, guarantees all persons charged with crime a fair and impartial trial by jury. But it is within the power of the trial judge to excuse individuals from the venire when good cause and a legitimate reason therefor are disclosed to the court. The greater number of individuals comprising the venire were excused from serving on the jury because of the wear and tear that would result to the automobile tires in traveling necessarily long distances to the place of trial. The rubber shortage is of common knowledge

to all at this time and it cannot be said that there was any abuse of discretion on the part of the trial judge in excusing members of the venire on this account. It is difficult to follow the reasoning of appellant in the contention that the excusing of these veniremen from duty prevented him from receiving a "fair and impartial" trial or that the action of the court resulted in a trial by a jury composed of "particular individuals." Appellant cites the case of *People v. Shannon*, 203 Cal. 139, 263 P. 522, in support of the contention that he has a right to a trial by a fair and impartial jury, and not to a jury composed of any particular individuals. In the *Shannon* case women had not been included in the panel for 1927, because, as indicated by the county board of supervisors, the courthouse of that county was improperly equipped for jurors of both sexes. The defendant contended on appeal that his constitutional right to "a trial by a jury of men and women" was violated through the action of the board of supervisors. This contention was answered by the court in the following language found at page 142 of 203 Cal., 263 P. at page 523 of the opinion: "It appears that the defendant did not interpose any challenge to the panel before the jury was sworn in the trial court, and it is, therefore, too late to present the objection here. \* \* \* The unauthenticated affidavit presented in this court for the first time does not serve to properly bring the matter to our attention. Assuming, however, that the point is properly before us, there is nothing in the state or Federal Constitutions, or in any statute, which guarantees one accused of a crime a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. \* \* \* He cannot complain if he is tried by an impartial jury, and can demand nothing more."

There is nothing contained in the opinion of the court in the *Shannon* case, which supports a conclusion that the action of the trial judge in the instant case resulted in a trial by a jury composed of particular individuals. The fact that the greater proportion of the venire was excused for the reason heretofore stated and that the jury was ultimately made up of individuals residing in Oroville and vicinity did not constitute the jury as one made up of particular individuals. *People v. Ferguson*, 124

Cal.App. 221, 226, 12 P.2d 158, 960; *People v. Britt*, 62 Cal.App. 674, 683, 217 P. 767.

[3] The record also fails to disclose that appellant was in any way prejudiced by the absence of residents of Chico upon the jury regardless of the fact that Chico was appellant's place of residence. The usual ground for complaint, where it is contended that there has been a denial of a fair and impartial trial, exists when the defendant has been denied a change of venue from the scene of the alleged crime. If, as a matter of fact, under a proper showing of local public prejudice, the trial in the instant case had taken place at Chico and the jury had been composed solely of residents of that community, there might then have been some reason to contend the defendant was denied a fair and impartial trial. No such showing was made in this case. However, even if it were to be assumed that the trial judge acted in an arbitrary manner in excusing certain veniremen for the reasons stated, the appellant is in no position to complain at this time. The record discloses the fact that the appellant failed to exhaust his peremptory challenges. There remained five unused peremptory challenges which might have been exercised in his behalf. Appellant also declared a number of times during the proceedings that he was satisfied with the jury. There is no indication in the record that any objection was made at any time to the excusing of veniremen, to the method of selecting jurors, or to the drawing of the panel. As a matter of fact, at the close of the trial and just prior to the arguments to the jury, counsel and the defendant were invited into the Judge's chambers and asked if there were any objections to the method employed in drawing the jury panel. The district attorney and the attorney for the appellant, the appellant being present at the time, stipulated that there was no objection to the method of drawing the jury panel or to the selection of jurors.

Appellant's contention that the verdict of the jury was contrary to law and that the evidence is insufficient to support the verdict may be considered together, as appellant insists that a conclusion by the jury that he is the person who stabbed Carter is, in view of the court's instructions, contrary to law and also unsupported by the evidence.

After retiring, the jury returned to have the testimony of the three witnesses, Zut-

ter, Hurley and Garrison, read to them. As heretofore indicated, these three witnesses were eyewitnesses to at least a part of the affray between appellant and Carter. Each of these witnesses testified that at one time during the fight which occurred outside of the cafe, the appellant, his wife, Mrs. Patterson, Mr. Robbins and Carter were all in a huddle together. The three witnesses also testified that they did not see anyone use a knife during the affray. It is urged by appellant that, in view of the fact that the evidence discloses that these three witnesses were sober at the time of the affray and that the other witnesses, including the participants in the fight, were intoxicated at that time, it must be concluded that the jury arrived at its verdict after having read to them the testimony of these three witnesses. With this conclusion in mind, it is further argued that the jury did not follow the instructions of the court, for if they had they could not have arrived at a verdict of guilty. It is urged that the testimony of the three witnesses, Zutter, Hurley and Garrison, is susceptible of only three possible conclusions, which are: That Carter was stabbed by Robbins, that Carter was stabbed by Mrs. Patterson, or that if appellant stabbed Carter it was in self-defense. One of the instructions which it is contended the jury failed to follow, in view of the testimony of the three witnesses mentioned, reads as follows: "Where the facts in the case, considering the evidence as a whole, are susceptible of two reasonable interpretations, one looking toward the guilt and the other toward the innocence of the defendant, it is your duty to give such facts and the evidence the interpretation which makes for the innocence of the defendant rather than adopt the one looking towards his guilt."

[4] There is substantial evidence in support of the verdict, and it is difficult to comprehend, in view of the evidence introduced at the trial, how the jury could have arrived at any other verdict than guilty. The verdict of the jury was wholly consistent with the quoted instruction and other instructions given for the purpose of placing a standard of guilt or innocence before the jury. The complaining witness, Carter, testified that while fighting with the appellant he remembered "feeling him hit me in the back with a knife, or something, I remember that." The witness Joe Shreve testified that he heard the appellant say to Mr. Robbins, just after the affray,



"Get me out of here, I sure as Hell knifed that s— of a b—." Mrs. Lewis, the daughter of Mr. Robbins, testified that she heard appellant state in front of his home after he had arrived there on the evening of the fight that he had stabbed somebody. The testimony of Carter, Shreve and Mrs. Lewis, when considered with the admitted facts in connection with the fight between Carter and appellant, constituted sufficient evidence in support of the verdict.

It is unnecessary to speculate on the purpose in the minds of the jurors in the request to have the testimony of Zutter, Hurley and Garrison read to them. The reading of this testimony could have been for the purpose of clearing up any one of a great number of questions presented by the evidence during the trial. It certainly cannot be presumed that such request was made in order to determine the sole question as to whether appellant was the one who had done the stabbing nor is there any logic in appellant's argument that the jury arrived at its verdict only after the reading of this testimony. Following the reasoning of appellant, that is, that the testimony of these three witnesses indicated the innocence of appellant, and that the verdict was contrary thereto, it would have to be presumed that the jury had already concluded from other evidence admitted during the trial that appellant was the one who stabbed Carter.

[5] The jury may have arrived at their verdict without relying on the testimony of any one of the last three mentioned witnesses, or may have accepted the testimony of all or any one of such witnesses as bearing upon some particular phase of the case. As indicated, other competent evidence referred to was sufficient to support the verdict rendered and the jury were not bound to accept or reject the testimony of any particular witnesses.

[6] Appellant makes the final contention that the court erred in sustaining an objection on the part of the district attorney to a question asked Carter in regard to a previous fight in which he had been a participant at the Log Cabin Cafe some three weeks prior to the time of the assault in question. In support of this ground for reversal the following language from 13 California Jurisprudence 693, § 77, is quoted: "But while the general rule is that the reputation of deceased cannot be given in evidence, an exception arises where the plea of self-defense is interposed, and the

evidence leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful whether the defendant was justified in believing himself in imminent danger at the hands of deceased."

Under such circumstances, the appellant argues, the deceased's reputation for peace and quiet is material.

Assuming that self-defense properly became an issue before the jury, and further assuming that the evidence introduced at the trial was of such a nature that a doubt remained as to which party, appellant or Carter, was the aggressor at the time of the assault, nevertheless the court properly sustained objections to questions asked Carter in regard to previous fights at the Log Cabin. The only issue which might have been properly placed before the jury at that time was Carter's general reputation for peace and quiet. Any evidence attempting to disclose specific prior instances in which Carter had been engaged in fights was inadmissible and properly rejected by the court. The appellant cannot complain of the court's ruling on this issue, as he made no attempt to introduce testimony of witnesses bearing on the issue of Carter's reputation for peace and quiet. *People v. Soules*, 41 Cal.App.2d 298, 106 P.2d 639.

[7] In answering the foregoing contention of appellant, we have, we believe, given appellant the benefit of every doubt, as it is quite questionable under the circumstances as to whether the issue of self-defense was involved. The defense of appellant proceeded throughout the greater portion of the trial on the theory that he had not been the one who stabbed Carter, and evidence to this effect was introduced by the defendant, even though he never took the stand in his own defense. The two theories of defense interposed by appellant were absolutely contradictory and in our opinion the issue of self-defense was one not to be considered by the jury.

It might be added that the evidence introduced at the trial fails to disclose any justification for the malicious attack made upon Carter by appellant, and certainly the verdict of the jury cannot be construed in any sense as amounting to a miscarriage of justice under section 4½, article VI, of the Constitution of California.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concurred.

**CALIFORNIA EMPLOYMENT COMMISSION v. BUTTE COUNTY RICE GROWERS ASS'N.\***

Civ. 6841.

District Court of Appeal, Third District,  
California.

May 25, 1943.

As Modified on Denial of Rehearing  
June 24, 1943.

Hearing Granted July 23, 1943.

**1. Taxation** ⇨585, 845

The California Employment Commission exists as an administrative agency of the state under the provisions of the Unemployment Insurance Act and has power to maintain action to recover unemployment insurance contributions and penalties. St.1939, p. 2053, § 45.3.

**2. Taxation** ⇨219

Business of a rice growers' association organized and maintaining warehouse as an agency and means of producing, preparing and marketing crops of its members, furnishing a method of jointly procuring farm supplies and handling the crops through its agents and employees, was not a "commercial enterprise" as distinguished from a "farming industry" within employment commission rule, under Unemployment Insurance Act, exempting agricultural labor in ordinary farming operations as distinguished from commercial enterprises. St.1933, pp. 255, 262, §§ 1192, 1213; St. 1939, p. 2053, § 45.3.

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Enterprise" and "Farming Industry".

**3. Agriculture** ⇨6

The spirit and purpose of legislation authorizing the incorporation of non-profit, cooperative agricultural associations was to create a system of group handling and marketing of produce of the farms as a part of farmer's agricultural industry for the benefit of both producers and consumers. St.1933, p. 60 et seq.; pp. 255, 262, §§ 1192, 1213.

**4. Taxation** ⇨219

Services performed by employees of a rice growers' association in hauling, cleaning, sacking or marketing rice of its members for the members in warehouse

maintained by association, was "agricultural labor" within meaning of Unemployment Insurance Act exempting agricultural labor from operation of the Act. St.1939, p. 2850, § 7.

The word "agriculture" primarily implies cultivation of fields and is synonymous with farming, husbandry, and tillage. It is defined as the art or science of cultivating the ground and raising and harvesting crops; the science and art of producing plants, grains, vegetables, foods and animals useful to man, including to a variable extent their preparation for the use of man and their disposal by marketing.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor" and "Agriculture".

**5. Taxation** ⇨319(1)

Rule of California Employment Commission that the term "agricultural labor" includes services performed by employee on a farm, and that such services did not constitute agricultural labor unless performed for owner or tenant of farm, was an unreasonable restriction of the term "agricultural labor" as used in the Unemployment Insurance Act and rule was therefore void to that extent. St.1935, p. 1242, § 90; St.1939, p. 2850, § 7.

**6. Constitutional law** ⇨62

Generally the legislature may delegate authority to administrative board to adopt and enforce reasonable rules for carrying into effect expressed purpose of a statute even though such rules include authorization to exercise discretion in so doing, provided that discretion is not purely arbitrary and it does not amount to a sanction to add to or enlarge or detract from or restrict the plain language and intent of legislature contained in statute. St.1935, p. 1242, § 90.

**7. Constitutional law** ⇨62

The legislature may not delegate authority to a board or commission to adopt rules which abridge, enlarge, extend or modify the statute creating the right.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by the California Employment Commission against Butte County Rice Growers Association, a corporation, to recover unemployment insurance contribu-

\* Subsequent opinion 146 P.2d 908.

tions and penalties. From a judgment for defendant, plaintiff appeals.

Affirmed.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., Maurice P. McCaffrey, Ralph R. Planteen, Glenn Walls, Leonard M. Friedman, Miriam E. Wolff, and Forrest M. Hill, all of Sacramento, and Lee Stanton, of Los Angeles, for appellant.

Herbert W. Whitten and Ware & Ware, all of Chico, for respondent.

Rogers & Clark and John H. Painter, both of San Francisco, amici curiae.

THOMPSON, Justice.

The plaintiff, California Employment Commission, brought this suit under the provisions of section 45.3 of the Unemployment Insurance Act of California, Stats. 1935, p. 1226, and amendments, Deering's Supp. to Gen. Laws of 1935, p. 2039, and Supp. 1939, p. 1714, Act 8780d, to recover alleged delinquent contributions and penalties from the defendant, Butte County Rice Growers Association, a farmers' co-operative marketing company, organized under the provisions of title XXIII of the Civil Code, now sections 1191-1221 of the Agricultural Code, St. 1933, p. 60 et seq. The Unemployment Act, by the terms of section 7, is specifically made inapplicable to "Agricultural labor." The trial court adopted findings and rendered judgment in favor of the defendants. From that judgment this appeal was perfected.

The only question to be determined is whether the employees of a farmers' co-operative association, composed of members who are actually engaged in farming, organized by law to aid the members only, in growing, handling and marketing their farm products, are deemed to constitute "agricultural labor."

[1] The plaintiff commission exists as an administrative agency of the State of California under the provisions of the Unemployment Insurance Act previously mentioned, and has power to maintain this action. October 26, 1914, the defendant, Butte County Rice Growers Association, was duly organized pursuant to law and filed its Articles of Incorporation, authorizing it to purchase seeds, plants and supplies and to perform services, in behalf of the members only, to aid them in growing, handling and marketing rice, vegetables, grains and horticultural products. For that purpose the defendant Association

constructed and maintained a warehouse at Richvale in Butte County where the rice of its members was stored, cleaned and prepared for market. Several men were employed as laborers to work in that warehouse. Seeds and supplies for use of the members in planting, growing and marketing their crops were stored in the warehouse and furnished to the members at cost in accordance with the rules and by-laws of the association. That enterprise was operated without profit to the association. Such supplies as chicken feed were occasionally furnished to the employees at cost and charged to their wage accounts. But these items were so inconsequential they are not worthy of consideration in determining whether the association was operated as a commercial enterprise as distinguished from a mere cooperative marketing organization conducted as an incident to the farming projects of its members. The officers and employees were selected and hired by the directors of the Association as the by-laws direct. We assume all parties to this action desire a determination on its merits of the chief issue regarding the liability of the Association as employer of agricultural labor.

It may be fairly assumed the Association had no power to, and it did not, engage in any commercial enterprise as distinguished from a nonprofit cooperative organization maintained solely to aid each of its members in cultivating, farming, handling and marketing his own agricultural products.

The articles of incorporation provide in part that the purposes for which the association was formed are:

"To associate together persons engaged in the cultivation, growing and marketing of rice, vegetables, grains and horticultural products, \* \* \*; to purchase seeds, plants and all kinds of supplies needed in growing and marketing crops, \* \* \*.

"To appoint such agents and officers as its business may require from members of the Association or otherwise. \* \* \*"

The By-Laws include the following provisions:

[Art. XV] "No person shall be a member who is not a bona fide grower of rice, grain or other horticultural product to the extent of five (5) acres of land.

[Art. XIII] "Membership \* \* \* shall cease at any time when the person holding a Certificate of Membership shall cease to be an actual owner or lessee, \* \* \*.



[Art. XI] "Certificates of membership shall be \* \* \* nonassignable, \* \* \*."

[Art. IV] "The Directors shall have power: \* \* \* To appoint and remove at pleasure all officers, agents and employees of the corporation, prescribe their duties, fix their compensation and require from them security for faithful service."

Under the provisions of section 90 of the Unemployment Insurance Act St.1935, p. 1242, to the effect that the commission "Shall adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act," rule 7.1 was adopted, as follows:

"Agricultural Labor Defined.—The term 'Agricultural Labor' includes all services performed:

"(1) *By an employee on a farm*, in connection with the cultivation of the soil, the raising and harvesting of crops; the raising, feeding, management of live stock, poultry, and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transporting, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations;

*"The services hereinbefore set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced.* Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.

"As used herein the term 'farm' includes, among others, stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, orchards and vineyards.

"Forestry and lumbering are not included within the exemption of agricultural labor." (Italics added.)

[2] Clearly the defendant Association was organized and the warehouse was maintained as an agency and means of producing, preparing and marketing the crops of the respective members. It furnishes a

method of jointly procuring farm supplies and handling the crops of members through their agents and employees in the manner provided by law. In no sense may the business of the Association be deemed to be a commercial enterprise as distinguished from a farming industry. The organization was maintained as a valuable adjunct to the farming activities of each member. The creation of non-profit, cooperative farming and marketing associations was authorized by law to benefit both the producers and the consumers by securing group handling of crops. That procedure is an incident to and a valuable part of the farming enterprise of each member. Recognizing the disadvantages and serious losses sustained by the farmers and the consumers of food products by individual handling of crops, the Legislature wisely enacted the previously mentioned statute in 1923, "to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation." § 653aa, Civ.Code. In declaring the urgent necessity for that legislation section 653ee of the same code asserts that:

"The public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing."

Regarding the nonprofit feature of such associations, section 1192 of the Agricultural Code provides that: "Associations organized hereunder shall be deemed 'non-profit', inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but *only for their members as producers.*" (Italics ours.)

Section 1213 of the last-mentioned code specifically provides that all statutory exemptions applicable to individual agriculturists shall likewise apply to their products in the possession or control of the association of which they are members. It reads:

"Any provisions of law which are in conflict with this chapter shall not be construed as applying to the associations herein provided for.

"Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association."

[3,4] The spirit and purpose of the legislation authorizing the incorporation of non-profit, cooperative agricultural associations was to create a system of group handling and marketing of produce of the farms as a part of the farmer's agricultural industry for the benefit of both the producers and the consumers.

In *Cowiche Growers, Inc. v. Bates, Com'r of Unemployment Comp.*, 10 Wash. 2d 585, 117 P.2d 624, upon which the appellant relies, it was held that employees of cooperative fruit associations, two of which handled only fruit of its own members, were not exempt from payment of contributions to the Unemployment Compensation Fund. Several associations united as plaintiffs to maintain that action. Some of the associations washed, packed and handled fruit as commercial industries independently of the growers. Some of them handled fruit for their own members, but also for others as a commercial business independently of its members. Two of them handled fruit for their own members only, on a nonprofit basis. The workmen who were employed in the warehouses did not perform services on the farms of the owners or lessees of the land. The court held that the plaintiffs, associations, were liable under such circumstances, for payment of unemployment contributions. There is a clear distinction between the above Cowiche Growers case and the present action. In that suit the Washington statute Laws Wash.1939, c. 214, p. 857, specifically defined the term "agricultural labor" as "services customarily performed by a farm hand *on a farm for the owner or tenant* of a farm." In this case the Unemployment Insurance Act contains no such definition of what is meant by the exclusion of agricultural labor from the provisions of the statute. In fact, it contains no definition of that term at all. The character of labor which was excluded by the Washington statute is much more limited than that of the California act. That statute specifically excluded only such services as were performed "*on a farm for the owner or tenant of a farm.*" The laborers who were employed in the ware-

houses in that case clearly were not working "*on a farm* for the owner or tenant." In the present case the California statute contains no such limitation of services. It is much more comprehensive than the Washington statute. It provides, in effect, that "agricultural labor" of every character shall be exempt from the operation of the Unemployment Act, wherever such services may be performed. If the laborers in the warehouse of this association, as agents of the farmers who were members thereof, were engaged in hauling, cleaning, sacking or marketing the rice of its members exclusively for the members, certainly they were employed in agricultural labor. Those duties are necessary incidents to raising rice. They are therefore agricultural in their nature. If the Cowiche Growers case were accepted as authority for holding that the employment of workmen in the warehouse under the circumstances of this case did not bring them within the exemption of agricultural labor under our statute because they did not actually work "*on a farm for the owner or tenant,*" then farm laborers who are engaged on a neighbor's property in the customary reciprocal exchange of agricultural services could not be so exempted. Yet it has been held an agreement between farmers to exchange farm labor renders the owner liable for injuries sustained by his employee even though the workman is injured while so employed on the property of a neighbor. It is nevertheless services performed in the course of employment. *Gabel v. Industrial Acc. Comm.*, 83 Cal. App. 122, 256 P. 564.

In the case of *North Whittier Heights Citrus Assoc. v. National Labor Relations Board*, 109 F.2d 76, upon which the appellant relies, it was held by the Ninth Circuit Court of Appeals that the employees of the marketing association did not come within the exemption clause of section 2, subdivision 3, of the National Labor Relations Act, commonly called the "Wagner Act", 29 U.S.C.A., § 151 et seq., so as to exclude them as agricultural laborers from its application. That suit involved the alleged interference of the Association with efforts on the part of Citrus Packing House Workers Union Local No. 21,091, a labor organization, to solicit membership in its union from the employees in the association. In applying the Wagner Act to "employees," the foregoing section of the act provides that the term "employee" "shall not include any individual employed

as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse." That case may be reasonably distinguished from the present action, for the reason that it involved "*the business of receiving, handling, washing, grading, assembling, packing and shipping the citrus fruit*" for not only its members, but also for other producers who were not members of the association. In other words, it was engaged in a separate business of handling and shipping fruit as a commercial industry because it served all producers whether they were members or not. The opinion so states. A rule is suggested to aid in determining what pursuits are included within the term "agricultural labor," as follows:

"When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry.' \* \* \*

"Petitioner maintains that the nature of the work is the true test. Perhaps it would more nearly conform to the true test to say that the nature of the work *modified by the custom of doing it* determines whether the worker is or is not an agricultural laborer."

In all that the court very properly says regarding the question as to what constitutes "agricultural labor," it evidently had in mind the fact that it was dealing with a fruit marketing association, as an industry separate and apart from the producers, although some of them were members of that organization. We heartily concur with the conclusion that when a farmer turns his produce over to an organization which is engaged wholly, or even in part, as a commercial industry in handling, packing, preparing and marketing farm products, regardless of its membership, its employees may not be considered agricultural laborers. Clearly they are then working for a separate industry. That situation is not true in the present action. We are of the opinion that case is not conclusive of the present appeal. The very purpose of the cooperative agricultural marketing association statutes of California, previously mentioned, is to enable the farmers to jointly handle their crops for mutual benefit as a part of their agricultural pursuits. A narrow construction of those statutes would defeat the very purpose for which they were enacted.

The meaning of the word "agriculture" is very comprehensive. It is derived from the Latin words "ager," a field, and "culture," cultivation. Primarily, it implies cultivation of the fields. Its synonyms are farming, husbandry and tillage. 3 C.J.S., Agriculture, p. 366, § 1; Webster's Dictionary of Synonyms, p. 36. In the authority last cited it is said, "Agriculture is by far the most comprehensive of these terms." It is almost uniformly defined by the authorities as the art or science of cultivating the ground and raising and harvesting crops; the science and art of producing plants, grains, vegetables, foods and animals useful to man, including to a variable extent their preparation for the use of man, *and their disposal by marketing*. Webster's New International Dictionary, p. 52; 3 C.J.S., Agriculture, p. 365, § 1; 2 Am.Jur. 395, § 2. In the authority last cited it is said that agriculture includes "every process and step necessary and incident to the completion of products therefrom *for consumption or market* and the incidental turning of them to account." We know of no necessity for a limited or strained construction of the term "agricultural labor" in the present case.

The appellant also cites two Colorado cases upon which it relies in support of the contention that the judgment should be reversed. Great Western Mushroom Co. v. Industrial Comm., 103 Colo. 39, 82 P.2d 751, and Park Floral Co. v. Industrial Comm., 104 Colo. 350, 91 P.2d 492. These cases, both of which were decided by the same court, involved the artificial production of mushrooms and flowers in hot-houses or greenhouses with the use of heating plants. They were not produced in the ordinary method of outdoor farming. On the contrary, nature's process of producing mushrooms and shrubs was substituted by an artificial hothouse method. On that account, the court held that the businesses did not come within the ordinary meaning of agriculture, but constituted commercial industries. In that case two justices dissented. In the later case of Industrial Comm. v. United Fruit Growers Ass'n, 106 Colo. 223, 103 P.2d 15, 17, involving the production and marketing of fruit by the growers through a nonprofit cooperative association exactly like the one which is involved in the present action, the Colorado court held that the employees of the association were engaged in agricultural labor. The latter case is distinguished



from the mushroom and flower cases in the following language:

"It is certain that the products involved herein are purely agricultural in character and were produced under ordinary field operations on fruit farms and orchards. Thus the decisions in *Great Western Mushroom Co. v. Industrial Commission*, 103 Colo. 39, 82 P.2d 751, and *Park Floral Co. v. Industrial Commission*, 104 Colo. 350, 91 P.2d 492, 494, wherein the products involved were 'specially cultivated under artificial structures or diggings' and not 'produced under ordinary field operations', are in no manner applicable in the case at bar."

[5] We are of the opinion that paragraph (1) of Rule 7.1, which was adopted by the California Employment Commission, is an unreasonable restriction of the term "agricultural labor," as it is used in section 7 of the Unemployment Insurance Act, and therefore void to that extent. Section 90 of the act authorized the Commission to "adopt and enforce rules and regulations \* \* \* to carry out the provisions of this act." The foregoing rule provides in part that, to exempt agricultural labor from the provisions of the act it must be performed "by an employee on a farm." Paragraph (2) further declares that "The services hereinbefore set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced." The quoted provisions of paragraph (1) of that rule are clear limitations of the ordinary meaning of the term "agricultural labor," as it is used in the act. It restricts the evident intention of the Legislature to exclude all agricultural labor whether it be performed on or off the farm belonging to the employer. If paragraph (1) of the foregoing rule should prevail, then a regular farmhand could not haul his employer's hay or fruit to market, without bringing himself within the provisions of the act, because his services would not be performed "on the farm." Nor could a fruit grower operate his own fruit dryer on land separated from the farm upon which the fruit is produced, which is a common practice in California, without subjecting his employees engaged in that work to the provisions of the Unemployment Act. Paragraph (1) of the foregoing rule is therefore an unreasonable assumption of

legislative power which is prohibited by law.

[6,7] It is true that the Legislature may delegate authority to administrative boards to adopt and enforce reasonable rules for carrying into effect the expressed purpose of a statute even though such rules include the authorization to exercise discretion in so doing, provided that discretion is not purely arbitrary and it does not amount to a sanction to add to or enlarge or detract from or restrict the plain language and intent of the Legislature contained in the statute. It has been uniformly held that a board, by the adoption of rules of administration, may not be permitted to determine what the law shall be in a particular case. *American Distilling Co. v. State Board of Equalization*, 55 Cal.App.2d 799, 131 P.2d 609; *Fillmore Union High School Dist. v. Cobb*, 5 Cal.2d 26, 33, 53 P.2d 349; 5 Cal.Jur. 677, § 94; 16 C.J.S., Constitutional Law, p. 337, 341, § 133; 11 Am.Jur. 955, § 240. It is an established principle of law that the Legislature may not delegate authority to a board or commission to adopt rules which abridge, enlarge, extend or modify the statute creating the right. *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 50 S.Ct. 412, 74 L.Ed. 1063, 1069; *People v. Kuder*, 93 Cal.App. 42, 51, 269 P. 198, 630; *Hodge v. McCall*, 185 Cal. 330, 197 P. 86; *Flickenger v. Industrial Acc. Comm.*, 181 Cal. 425, 432, 184 P. 851, 19 A.L.R. 1150; 11 Am.Jur. 955, § 240. In the authority last cited, at page 956, it is said:

"Clearly, the legislative body must declare the policy of the law and fix some kind of legal principles which are to control in given cases. It must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law, because *regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently defined by statute*, and must, moreover, be within the framework of such policy. \* \* \*

"\* \* \* 'In all cases the rules and regulations may be tested in the courts to determine whether they are reasonably directed to the accomplishment of the purposes of the statute under which they are made. *Moreover, regulations promulgated by administrative departments may not extend the statute or modify its provisions.*' (Italics added.)

We conclude that paragraph (1) of rule 7.1 which is involved in the present case is an unwarranted and unlawful restriction of the Unemployment Act with respect to the application of that statute to "agricultural labor" and it is therefore void. To construe paragraph (2) of the Rule as excluding employees of a farmers' co-operative association which is engaged solely in marketing produce for its members from the term "agricultural labor" would also render that paragraph invalid.

The judgment is affirmed.

PEEK, J., and ADAMS, P. J., concurred.



59 Cal.App.2d 146

**CARPENTER et al. v. HAMILTON et al.**  
Civ. 14043.

District Court of Appeal, Second District,  
Division 2, California.  
June 10, 1943.

Rehearing Denied June 30, 1943.

Hearing Denied Aug. 5, 1943.

#### 1. Pleading ⚡214(1, 4, 5)

A demurrer does not admit as true facts which are alleged as conclusions of law, evidence, matters of opinion, or surplusage.

#### 2. Mortgages ⚡337, 411

The right to enforce a deed of trust by trustee's sale proceedings and foreclosure of deed of trust as a mortgage are alternative consistent remedies, so that institution of one of such proceedings does not preclude subsequent enforcement by alternative proceeding. Code Civ.Proc. § 725a.

#### 3. Mortgages ⚡411

Beneficiary under a trust deed after delivering to trustee and recordation of declaration of default and election to have trustee sell property, may cancel declaration and terminate trustees sale proceedings and pursue alternative remedy by foreclosing trust deed as a mortgage. Code Civ.Proc. § 725a.

138 P.2d—23

#### 4. Mortgages ⚡529(10)

Complaint, in action to set aside foreclosure of trust deed as a mortgage, alleging that beneficiaries under trust deed had concealed from trustors their original election to proceed with a trustees sale but, after recordation of notice of default, canceled notice and commenced foreclosure, was insufficient as failing to allege "fraud" of defendants. Code Civ.Proc. § 725a.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Margaret B. Carpenter and another against Archibald J. Hamilton and another to set aside a judgment of the superior court decreeing foreclosure of a trust deed as a mortgage, and ordering sale of property for alleged fraud on part of defendants. From a judgment for defendants entered after demurrer to plaintiffs' complaint was sustained without leave to amend, plaintiffs appeal.

Affirmed.

See, also, 52 Cal.App.2d 447, 126 P.2d 395.

Roy A. Linn, of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent Hamilton.

Arch. H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent Title Insurance & Trust Co.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants, predicated upon the sustaining of a demurrer to plaintiffs' complaint without leave to amend, in an equitable action to set aside a judgment of the superior court decreeing foreclosure of a trust deed as a mortgage, and ordering sale of the property described in the trust deed for the purpose of satisfying the amount due on the note for which the trust deed was given as security. The basis of the complaint is alleged fraud upon the part of defendants.

Plaintiffs also urge that it was error for the trial court to refuse them leave to file a proposed amended complaint.

[1] The essential allegations of the complaint and the proposed amended complaint which are well pleaded\* are that:

(a) Plaintiffs executed a trust deed as security for a promissory note payable to defendant Archibald J. Hamilton, which trust deed was foreclosed as a mortgage pursuant to the requirements of section 725a of the Code of Civil Procedure. (See *Hamilton v. Carpenter*, 15 Cal.2d 130, 98 P.2d 1027.

(b) Defendant Title Insurance and Trust Company was named as trustee in the trust deed mentioned in paragraph (a).

(c) Prior to the filing of the foreclosure action mentioned in paragraph (a), defendant Hamilton had deposited the note and trust deed above referred to with defendant trustee together with a written declaration of default and a demand for the sale of the property described in the trust deed pursuant to the terms thereof.

(d) Pursuant to the demand of defendant Hamilton, defendant trustee recorded in the office of the County Recorder of Los Angeles County a notice of default and election to sell the property described in the trust deed pursuant to the power of sale contained therein.

(e) After electing to have the trustee proceed under the terms of the trust deed, defendant Hamilton cancelled the notice of default and election to sell the property described in the trust deed. After receiving the notice of cancellation defendant trustee did not mail to plaintiffs a copy of the notice of default defendant Hamilton had elected to declare, but instead, returned the note and deed of trust to defendant Hamilton, who thereafter instituted the foreclosure action mentioned in paragraph (a).

(f) Plaintiffs had no knowledge, at the time of the trial of the foreclosure action, of the facts set forth in paragraphs (b) to (e) inclusive, and by reason of the suppression and concealment of said facts, plaintiffs were prevented "from making the defense to said action that the contract had been altered or cancelled by said Hamilton, and that the executory obligation of the plaintiffs had been extinguished because

the plaintiffs did not consent to said alteration."

This is the sole question necessary for us to determine:

*Can a beneficiary under a deed of trust, after executing and delivering to the trustee a declaration of default and election to have the property described in the trust deed sold pursuant to the power of sale contained therein, which election is duly recorded, cancel the declaration of default and terminate the trustee's sale proceedings, and thereafter pursue the alternative remedy of enforcing the obligation of the trust deed by proceeding to foreclose the same as a mortgage, pursuant to the provisions of section 725a of the Code of Civil Procedure?*

[2] This question must be answered in the affirmative. The right to enforce a deed of trust by (1) trustees' sale proceedings, and (2) foreclosure of the deed of trust as a mortgage, are alternative consistent remedies. The institution of one of such proceedings does not preclude subsequent enforcement of the obligation of the trust deed by the alternative proceeding. (*Commercial Centre Realty Co. v. Superior Court*, 7 Cal.2d 121, 129, 59 P.2d 978, 107 A.L.R. 714; *McDonald v. Smoke Creek Live Stock Co.*, 209 Cal. 231, 237, 286 P. 693; *Mayhall v. Eppinger*, 137 Cal. 5, 7, 69 P. 489; see also *Flack v. Boland*, 11 Cal. 2d 103, 107, 77 P.2d 1090.

[3] In view of the foregoing rules and authorities, it is clear that the beneficiary, under a deed of trust, by delivering to the trustee a declaration of default and election to proceed according to the power of sale contained in the trust deed, is not estopped from rescinding the declaration of default and thereafter electing to pursue the alternative remedy of enforcing the obligation, to secure which the deed of trust was executed, by filing an action to foreclose the deed of trust as a mortgage pursuant to the terms of section 725a of the Code of Civil Procedure.

[4] Applying the foregoing rule to the facts of the instant case, it is clear that had the plaintiffs known the facts which they allege were concealed from them, such facts would not have constituted a defense to the foreclosure action which resulted in

\* For the purpose of testing the sufficiency of a complaint to state a cause of action, a demurrer does not admit as true facts which are alleged as: (1) Conclusions of law, (2) evidence, (3)

matters of opinion, or (4) surplusage. (21 Cal.Jur. (1925), page 96, section 62, et seq.; 49 C.J. (1930), page 438, sec. 434c.)



the decree which they now seek to set aside.

As the complaint and proposed amended complaint failed to allege any facts showing fraud upon the part of either or both of the defendants, a cause of action was not stated and the judgment and order of the trial court were correct.

In view of our conclusions it is unnecessary to discuss other points presented by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



59 Cal.App.2d 149

**CARPENTER et al. v. HAMILTON et al.**  
Civ. 14072.

District Court of Appeal, Second District,  
Division 2, California.

June 10, 1943.

Rehearing Denied June 30, 1943.

Hearing Denied Aug. 5, 1943.

**1. Pleading** ⚡214(1, 4, 5)

A demurrer does not admit as true facts which are alleged as conclusions of law, evidence, matters of opinion, or surplusage.

**2. Equity** ⚡66

Judicial sales ⚡44

A judicial sale will not be set aside in equity at instance of a beneficiary unless he has paid obligation for satisfaction of which sale took place, or offers to do equity by paying obligation.

**3. Mortgages** ⚡529(10)

Where neither complaint nor proposed amended complaint in suit to set aside judicial sale of realty following foreclosure of trust deed contained allegation showing that plaintiffs had paid or offered to pay their obligation, both failed to state a cause of action.

\* For the purpose of testing the sufficiency of a complaint to state a cause of action, a demurrer does not admit as true facts which are alleged as: (1) Conclusions of law, (2) evidence, (3)

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Margaret B. Carpenter and another against Archibald J. Hamilton and another to set aside a sale of real property pursuant to a writ of execution issued upon a decree foreclosing a deed of trust. From a judgment for defendants entered after demurrer to plaintiffs' complaint was sustained without leave to amend, plaintiffs appeal.

Affirmed.

See, also, 138 P.2d 353.

Roy A. Linn, of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants, predicated upon the sustaining of a demurrer to their complaint without leave to amend, in an equitable action to set aside a sale of real property pursuant to a writ of execution issued upon a decree foreclosing a deed of trust.

They also urge that it was error for the trial court to refuse them leave to file a proposed amended complaint.

[1] The essential allegations of the complaint and proposed amended complaint which are well pleaded\* are that:

(a) Plaintiffs executed a trust deed as security for a promissory note payable to defendant Archibald J. Hamilton, which trust deed was foreclosed as a mortgage pursuant to the requirements of section 725a of the Code of Civil Procedure. (See *Hamilton v. Carpenter*, 15 Cal.2d 130, 98 P.2d 1027.)

(b) On December 3, 1940, the property described in the deed of trust consisting of two separate parcels of real estate, a portion of which was homesteaded, was sold en masse.

(c) Defendant R. E. Allen, who acted as commissioner at the sale, was not a court commissioner appointed by the Superior Court of Los Angeles County, pursuant to the provisions of article VI, section 14,

matters of opinion, or (4) surplusage. (21 Cal.Jur. (1925), page 96, section 62, et seq.; 49 C.J. (1930), page 438, sec. 434c.)

of the Constitution of California, and section 258 of the Code of Civil Procedure; the sale was made by the commissioner with knowledge that plaintiffs had not received written notice thereof; and the commissioner was an "interested party" in that he was a personal friend of plaintiffs' counsel and was dependent "upon the good will of attorneys who foreclosed mortgages and trust deeds for his appointments" as a commissioner.

The complaint and proposed amended complaint are devoid of any allegation that plaintiffs (a) have paid the obligation for which they executed the trust deed as security, or (b) offer to pay the obligation which they owe.

This is the sole question necessary for us to determine:

*Did the complaint and proposed amended complaint fail to state a cause of action because neither contained an allegation that plaintiffs (1) had paid the obligation to satisfy which the property described in the trust deed had been sold, nor (2) offer to pay the obligation to secure which the trust deed had been given?*

This question must be answered in the affirmative, and is governed by the maxim that, "He who seeks equity must do equity". This maxim has been crystalized in California into this rule:

[2] A judicial sale will not be set aside in equity at the instance of a beneficiary unless he (1) has paid the obligation for the satisfaction of which the sale took place, or (2) offers to do equity by paying the obligation he has incurred. (Touli v. Santa Cruz County Title Co., 20 Cal.App.2d 495, 499, 67 P.2d 404; Leonard v. Bank of America, etc., Ass'n, 16 Cal.App.2d 341, 342, 60 P.2d 325; Williams v. Koenig, 219 Cal. 656, 660, 28 P.2d 351; Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 290, 119 P. 82.)

[3] Applying the foregoing rule to the facts in the present case, it is evident that since neither the complaint nor the proposed amended complaint contained an allegation showing that plaintiffs had paid their obligation, nor offered to pay the same, the complaint and proposed amended complaint failed to state a cause of action. Therefore the demurrer to the complaint was properly sustained, and the order denying plaintiffs permission to file a proposed amended complaint was correct.

\* Subsequent opinion 147 P.2d 563.

In view of our conclusions, it is unnecessary to discuss the other questions presented by plaintiffs. However, most of the propositions which plaintiffs urge have been disposed of by us, adversely to their contentions, in *Hamilton v. Carpenter*, 52 Cal.App.2d 477, 126 P.2d 395.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



### CARPENTER et al. v. HAMILTON.\*

Civ. 14113.

District Court of Appeal, Second District,  
Division 2, California.

June 10, 1943.

Rehearing Denied June 30, 1943.

Hearing Granted Aug. 5, 1943.

#### 1. Homestead ☞115(2)

The word "mortgage", as used in statutes providing that homestead is subject to execution or forced sale in satisfaction of judgment obtained on debt secured by mortgage on premises executed and acknowledged by husband and wife or on debt secured by mortgage on premises executed and recorded before declaration of homestead was filed for record, includes a trust deed. Civ.Code, § 1241, subs. 3, 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

#### 2. Homestead ☞121

Where homestead selected was subject to duly recorded trust deed previously executed by claimants, it was unnecessary when selling property pursuant to decree of foreclosure to comply with statutes prescribing procedure to be followed generally on execution against homestead. Civ.Code, § 1241, subs. 3, 4; §§ 1245-1255.

#### 3. Mortgages ☞507

Commissioner appointed to sell land in foreclosure of trust deed in accordance with statute governing such foreclosure proceeding need not be a court commission-

er appointed pursuant to constitutional and statutory provisions governing court commissioners of superior court. Code Civ. Proc. §§ 258, 726; Const. art. 6, § 14; Civ.Code, § 1241.

#### 4. Mortgages ⇨381

Statute pertaining to procedure for foreclosure of trust deed is constitutional. Code Civ.Proc. § 726.

#### 5. Mortgages ⇨411

Beneficiary under trust deed who has elected to proceed according to power of sale contained therein is not "estopped" from rescinding declaration of default, and thereafter electing to pursue alternative remedy of enforcing obligation by foreclosure of trust deed as a mortgage. Code Civ.Proc. § 725a.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

#### 6. Mortgages ⇨549

Trustor's proposed amended answer to beneficiary's cross-complaint to recover for use and occupancy of premises after foreclosure of trust deed, which alleged that commissioner appointed pursuant to statute governing appointment of commissioners for sale on foreclosure was not a court commissioner provided for in Constitution and statute relating to commissioners for superior court and that beneficiary had first evidenced election to proceed by trustee's sale, did not state a defense. Code Civ.Proc. §§ 258, 725a, 726; Const. art. 6, § 14.

#### 7. Pleading ⇨147

A "cross-complaint" is proper whenever defendant seeks affirmative relief which affects property to which action relates. Code Civ.Proc. §§ 442, 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Complaint".

#### 8. Quieting title ⇨39

Where plaintiffs sought to quiet title to particular lot and cross-complaint sought to recover reasonable rental value of same property, cross-complaint was properly filed as seeking relief affecting property to which action related. Code Civ.Proc. § 442.

#### 9. Mortgages ⇨549

Purchaser of property at foreclosure sale of trust deed is entitled to recover

from trustor in possession reasonable value for use and occupancy of premises from time of sale until a redemption. Code Civ. Proc. § 707.

#### 10. Mortgages ⇨549

Where trustor occupied premises from date of foreclosure of trust deed as a mortgage to end of period of redemption, purchaser at foreclosure sale was entitled to recover reasonable rental value of premises for such period. Code Civ.Proc. § 707.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Margaret B. Carpenter and another against Archibald J. Hamilton to quiet title to a parcel of land, wherein defendant cross-complained to recover reasonable value for use and occupancy of premises. Judgment for defendant in quiet title action and in cross-action, and plaintiffs appeal.

Affirmed.

See, also, 138 P.2d 353.

Roy A. Linn, of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiffs appeal from a judgment (1) in favor of defendant in an action to quiet title to a parcel of land upon which was located a dwelling house, and (2) in favor of defendant on his cross complaint to recover from plaintiffs the reasonable value of the use and occupancy of the property described in the complaint. The action was tried before the court without a jury.

The essential facts are these:

In April, 1935, plaintiffs purchased from defendant two parcels of real estate hereinafter designated as Lots 5 and 6. A dwelling house was located upon Lot 5. The purchase price for the two Lots was \$12,500. Plaintiffs paid \$5,000 in cash, and gave a promissory note, secured by a trust deed upon the purchased property, for the balance of \$7,500. On May 9, 1935, the deed of trust was duly recorded in the office of the county recorder of Los Angeles County.

On August 14, 1935, plaintiff, Margaret B. Carpenter, duly recorded in the office of the county recorder of Los Angeles



County a declaration of homestead covering Lot 5 and the residence located thereon.

Thereafter plaintiffs defaulted in the payments due on the promissory note above mentioned, and defendant herein instituted an action to foreclose the trust deed pursuant to the provisions of section 725a of the Code of Civil Procedure. A decree of foreclosure was entered as prayed and subsequently affirmed by the Supreme Court. (*Hamilton v. Carpenter*, 15 Cal.2d 130, 98 P.2d 1027.)

The decree of foreclosure ordered the property described in the trust deed sold, and appointed R. E. Allen a commissioner for such purpose. After the decree of foreclosure had become final defendant purchased the property described in the trust deed at a commissioner's sale for the sum of \$10,757.59, and received a commissioner's certificate of sale which was duly recorded. At the expiration of the period of redemption defendant received and recorded a commissioner's deed to the property.

Plaintiffs occupied the residence located on Lot 5 from May 9, 1935, to and including December 5, 1941.

There are four questions presented for our determination, which will be stated and answered hereunder seriatim.

*First: Is a homestead subject to sale, pursuant to a writ of execution issued on a decree foreclosing a deed of trust as a mortgage under the provisions of section 725a of the Code of Civil Procedure, in the absence of compliance with the provisions of sections 1245 to 1255 inclusive of the Civil Code?*

This question must be answered in the affirmative. Section 1241 of the Civil Code, so far as material here, reads:

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained: \* \* \*

"3. On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.

"4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."

[1] The word "mortgage" as used in subdivisions 3 and 4 of the foregoing section includes for the purposes of the section a trust deed. (*Roberts v. True*, 7 Cal.

App. 379, 381, 94 P. 392. See also 25 California Law Review (May, 1938) No. 4, Page 369.)

[2] Therefore since a homestead selected for the benefit of the trustor and his wife is subject to a deed of trust previously executed by them and duly recorded, it was unnecessary, as contended by plaintiffs, when selling the property pursuant to the decree of foreclosure to comply with the provisions of sections 1245 to 1255 inclusive of the Civil Code.

*Second: Did the trial court commit prejudicial error in refusing plaintiffs permission to file an amendment to their answer to defendant's cross complaint to show that (a) R. E. Allen was not a qualified commissioner to act pursuant to the decree of foreclosure, because he was not one of the eight court commissioners of the Superior Court of Los Angeles County authorized by article VI, section 14 of the Constitution of California and section 258 of the Code of Civil Procedure, and (b) defendant prior to the institution of the foreclosure action, had caused a notice of default to be filed with the trustee named in the trust deed, and had demanded a sale of the property described in the trust deed pursuant to the power of sale contained therein, which demand was subsequently cancelled?*

[3-5] This question must be answered in the negative.

(a) It is conceded that R. E. Allen was not a court commissioner of the Superior court of Los Angeles County appointed pursuant to article VI, section 14 of the Constitution of the State of California, or section 258 of the Code of Civil Procedure. However, he was appointed in accordance with the authority vested in the Superior Court by section 726 of the Code of Civil Procedure, which section has been held constitutional and not to be in conflict with any other constitutional provision. (*County Bank v. Goldtree*, 129 Cal. 160, 164, 61 P. 785.)

(b) We have held that a beneficiary under a deed of trust, by delivering to the trustee a declaration of default and election to proceed according to the power of sale contained in the trust deed, is not estopped from rescinding the declaration of default, and thereafter electing to pursue the alternative remedy of enforcing the obligation, to secure which the deed of trust was executed, by filing an action to

foreclose the deed of trust as a mortgage pursuant to the terms of section 725a of the Code of Civil Procedure. (Carpenter v. Hamilton, Cal.App., 138 P.2d 353, this day decided.)

[6] In view of the foregoing rules none of the facts, set forth in the proposed amendment to the answer to the cross complaint, constituted a defense to such cross complaint, and the trial court did not abuse its discretion in refusing plaintiffs permission to file a proposed amendment.

*Third: When an action to quiet title is instituted, is it proper for defendant to file a cross complaint for the reasonable value of the use and occupancy by the plaintiff of the property described in the complaint?*

[7] This question must be answered in the affirmative. A cross complaint is proper whenever the defendant seeks affirmative relief which affects the property to which the action relates. (Section 442 of the Code of Civil Procedure; California Trust Co. v. Cohn, 214 Cal. 619, 624, 7 P.2d 297; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 604, 116 P.2d 465.)

[8] In the instant case the plaintiff sought to quiet title to Lot 5, and the cross complaint sought to recover the reasonable rental value of the same property. Therefore the complaint and cross complaint both sought relief relative to the same property, and the cross complaint was properly filed under the provisions of section 442 of the Code of Civil Procedure.

*Fourth: Is the purchaser of property at a foreclosure sale, held pursuant to a decree foreclosing a trust deed as a mortgage, entitled to recover from the trustor in possession the reasonable value of the use and occupancy of the premises from the time of the sale until the trustor vacates the property?*

[9] This question must also be answered in the affirmative. Section 707 of the Code of Civil Procedure provides that: "The purchaser from the time of the sale until a redemption, \* \* \* is entitled to

receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof." (See also Reynolds v. Lathrop, 7 Cal. 43, 46; McDevitt v. Sullivan, 8 Cal. 592; Webster v. Cook, 38 Cal. 423, 425; Harris v. Foster, 97 Cal. 292, 295, 32 P. 246, 33 Am.St.Rep. 187; Clarke v. Cobb, 121 Cal. 595, 599, 54 P. 74; Shintaffer v. Bank of Italy, 216 Cal. 243, 245, 13 P.2d 668; First Nat., etc., Bk. v. Staley, 219 Cal. 225, 227, 25 P.2d 982; Title Ins. & Trust Co. v. Pfenninghausen, 57 Cal.App. 655, 657, 207 P. 927; Fowler v. Lane Mtg. Co., 58 Cal.App. 66, 69, 207 P. 919.)

[10] Since the plaintiffs occupied the property in question from December 3, 1940, the date of the foreclosure sale, to and including December 3, 1941, the end of the period of redemption, defendant was entitled to recover from them the reasonable rental value of Lot 5 and the house located thereon, under the above stated rule.

In view of our conclusions it is unnecessary to consider other contentions urged by plaintiffs. Suffice it to say, this is the sixth \* time that the appellate courts have been called upon to review various phases of litigation between these parties which originated with the filing of the foreclosure action described in Hamilton v. Carpenter, 15 Cal. 2d 130, 98 P.2d 1027. In each case the decisions have been against the contentions of plaintiffs herein, and in many of the cases questions previously ruled upon have been urged by plaintiffs. It is to be hoped that plaintiffs will now fully appreciate the fact that they have had their days in court and will not waste public funds in further needless and useless litigation.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurred.

W. J. WOOD, J., concurred in the judgment.

\* (1) Hamilton v. Carpenter, 15 Cal. 2d 130, 98 P.2d 1027; (2) Hamilton v. Carpenter, 52 Cal.App.2d 447, 126 P.2d 395; (3) Hamilton v. Carpenter, 52 Cal.

App.2d 449, 126 P.2d 397; (4) Carpenter v. Hamilton, Cal.App., 138 P.2d 353; and (5) Carpenter v. Hamilton, Cal. App., 138 P.2d 355.

58 Cal.App.2d 831

PEOPLE ex rel. POLLOCK et al. v.  
BOGART.  
Civ. 6879.

District Court of Appeal, Third District,  
California.

May 27, 1943.

### 1. Infants ☞16

On petition to vacate orders declaring minor grandchildren to be wards of juvenile court, grandmother's mere statement that children were in her custody was of no value as against allegation and presumed proof before juvenile court that children's custody was in their mother, and therefore grandmother was not a "necessary party" upon whom service of citation was a jurisdictional prerequisite to the orders and grandmother was not a "person having an interest in the proceeding" entitled to attack them. St.1937, pp. 1032, 1037, §§ 701, 735; St.1939, p. 3027, § 700(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party" and "Person Having an Interest in the Proceeding".

### 2. Infants ☞16

Orders declaring movant's three minor grandchildren to be wards of the juvenile court would not be set aside more than a year after their issuance on ground that it could not be presumed that movant claiming to have had custody of the children at the time was served with citation, where fact of service was stated in the record. St.1937, pp. 1034, §§ 722(b), 726; St.1939, p. 3027, § 700.

### 3. Infants ☞16

After the time for an appeal has elapsed and after the six months within which relief may be obtained from a judgment taken by mistake, an attack upon an order of the juvenile court is an attack upon the judgment and unless some fatal error appears upon the face of the record petitioner is precluded from proceeding further. St.1939, p. 3027, § 700; Civ.Code Proc. § 473.

### 4. Infants ☞16

Where grandmother's petition, filed approximately a year after entry of orders, to set aside orders declaring three minor grandchildren to be wards of the juvenile court did not disclose that there had been a change in the welfare of the minors which

would demand vacation of the orders, petition was decided in light of face of record disclosing that notice had been properly given to interested parties and trial court properly refused to hear proof on the merits of the petition. St.1937, pp. 1034, 1040, §§ 722(b), 726, 745; St.1939, p. 3027, § 700.

### 5. Infants ☞16

Where record showed nothing inconsistent with recital of orders declaring movant's three minor grandchildren to be wards of the juvenile court, that "due and legal notice" had been given to "all parties entitled thereto" recital was accepted as "prima facie truth" and all presumptions not contradicted by the record were in favor of the judgment, and movant's offer of proof that she had not been served with notice of the proceeding was properly refused on ground that motion to set aside orders was a "collateral attack" upon orders. St.1937, pp. 1032, 1037, §§ 701, 735; St.1939, p. 3027 § 700(c); Civ.Code Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Prima Facie Truth".

### 6. Judgment ☞518

The distinction between "collateral" and "direct attacks" upon a judgment is that in the former the record alone can be inspected, and is conclusively presumed to be correct, while in the latter the facts may be shown, and thus the judgment itself on appeal may be reversed or modified.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

### 7. Judgment ☞297, 340

Unless invalidity of a judgment is apparent from the record, the court rendering it, in the absence of an application within six months after its rendition for relief from mistake, is powerless to modify or to vacate the judgment, and the sole remedy of the aggrieved party is only by a new action. Civ.Code Proc. § 473.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by the People of the State of California on the relation of Barbara Eloise Pollock and others against Virginia Bogart. From an order denying a motion to vacate and set aside orders declaring cer-



tain grandchildren were wards of the juvenile court and committing them to separate foster homes, defendant appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Otis D. Babcock, Dist. Atty., Elvin F. Sheehy, Asst. Dist. Atty., and Bradford, Cross & Prior, all of Sacramento, for respondents.

PEEK, Justice.

This is an appeal from an order denying a motion to vacate and set aside orders declaring that the three minor grandchildren of appellant were wards of the juvenile court and committing them to separate foster homes.

The proceedings were instituted on April 28, 1941, by Ethelwyn Pollock, the mother of Georgia, Ethelwyn and Barbara, aged six, four and three years respectively, by the filing of a petition wherein she alleged that the children came within the provisions of subdivision (c) of section 700 of the Welfare and Institutions Code, St.1939, p. 3027, in that they were not provided with the necessities of life by their parents, and praying that they be adjudged wards of the juvenile court. The petition also alleged that the mother had been awarded the custody of the children in a previous divorce action, and that she and the children resided at the same address as the appellant in the city of Sacramento.

At the hearing on the mother's petition the court found that all of the facts contained therein were true; that each child came within the terms of subdivision (c) of section 700 of said code. The children were adjudged wards of the juvenile court, and, by separate commitments dated May 2, May 5, and June 6, 1941, were committed to different foster homes.

Approximately a year later, on the 7th day of May, 1942, and long after the time for appeal had elapsed, appellant moved the court to vacate and set aside the orders on the ground that the court was without jurisdiction, that at the time of the foregoing proceedings and for a long time prior thereto the minors were in her care and custody, and although she was their grandmother she was not served with notice of said proceedings, and that the minors did not come within any of the provisions of section 700 or 701 of the Welfare and Institutions Code, St.1939, p. 3027, St.1937, p. 1032. At the

conclusion of the hearing of said petition the trial court, in its findings, properly followed the directions set forth in section 735 of the said code, St.1937, p. 1037, and found that the record was silent as to the actual giving of notice; that the record was also silent as to who had the custody of the children twenty-four hours prior to the hearing, yet it could not be presumed (Canadian & American Mortgage & Trust Co. v. Clarita Land & Investment Co., 140 Cal. 672, 74 P. 301) that notice was not properly given in view of the recital in the orders that "due and legal notice" had been given to "all parties entitled thereto"; that no appeal was taken from the orders and that the same had become final, and that more than six months had elapsed since the making and entry of said orders and commitments. The appellant's offer of proof in rebuttal to the findings was refused on the ground that such motion constituted a collateral attack on the judgment; that therefore "the court is limited to an inspection of the record only, which appears valid on its face" and further that petitioner "is not a person having an interest in the proceeding who could attack said orders and commitments."

The appellant in her brief enlarges upon the allegations set forth in her petition before the trial court, alleging that as the grandmother and as the one who had the custody of the children, she was entitled to notice of the hearing; that it cannot be presumed that she was served with a citation; that the juvenile court had continuing jurisdiction, and that her motion to vacate the judgment was not a collateral attack upon it.

In view of the long line of decisions in this state bearing both directly and indirectly upon the question raised in appellant's first contention, our answer must be in the negative. The only provision in said act as regards one upon whom service of citation shall be made is contained in subdivision (b) of section 722 and section 726, St.1937, p. 1034. The first mentioned section (subdivision [b] of section 722) provides that the verified petition shall contain the names and residences, if known to petitioner, of the parents or guardian of such person. Section 726 provides only that a citation shall issue to the parent or guardian or other person having the custody or control of the person concerning whom the petition is filed. In the original petition it appears that by reason of a previous order

of the court the mother had been awarded the legal custody of the children, and at the time of the filing of the petition she and the children were living at the same address as appellant.

Appellant's petition is entirely devoid of contradiction insofar as the facts appearing in the mother's petition are concerned. The mere statement by appellant that the children were with her in her home and under her care and custody is of no value as against the allegation (and presumed proof before the trial court) of actual legal custody in the mother.

[1] Therefore in view of such uncontradicted facts so appearing upon the face of the record we do not feel that appellant was a necessary party upon whom service of citation was a jurisdictional prerequisite, and not being a parent or guardian of the minors nor in anywise having legal custody of them, appellant is not a person having an interest in the proceeding as contemplated by the Welfare and Institutions Code.

[2] The trial court's finding that the fact of service as stated in the record and not the proof of service was the essential element, is a complete answer to appellant's second contention. In *re Estate of Eikerkotter* 126 Cal. 54, 58 P. 370.

[3,4] It is a further contention of appellant that because the juvenile court is one of continuing jurisdiction until the ward attains the age of 21 years, and that by virtue of the provisions of section 745 of said code, St.1937, p. 1040, any order made under section 700 may be changed or modified at any time in the discretion of the court, that therefore, the court should have heard appellant's motion on the merits. Appellant fails to consider the rule that after the time for appeal has elapsed and after the six months period as set forth in section 473 of the Code of Civil Procedure has expired, then any attack upon such order is a direct attack upon the judgment itself, and unless some fatal error appears upon the face of the record the petitioner is precluded from proceeding further. There are no facts alleged in appellant's petition tending to show there has been a change in the status of the parties or the welfare of the minors since the commitments were made and entered which would demand a modification or vacation of such orders by the trial court. Because of the time of the filing of appellant's petition the determination thereof must be decided in the light of what appears upon the face of

the record, and appellant has not directed our attention to a single circumstance other than as herein mentioned, which would justify a hearing on the merits.

Lastly, appellant states "that this is not a collateral attack upon the judgment" and rests her case on such statement. It has already been noted that unless the invalidity of a judgment is apparent from an inspection of the record the court is powerless to vacate such order. Although this general principle is subject to certain exceptions, none, however, appears in the present case.

[5] The record shows nothing contradictory of, or inconsistent with, the recital in the original order of the court, and therefore it must be accepted as at least prima facie truth, and all presumptions not contradicted by, or inconsistent with, the record are in favor of the judgment. *Lyons v. Roach*, 84 Cal. 27, 23 P. 1026. It logically follows that appellant's offer of proof was properly refused by the court on the ground that such motion constituted a collateral attack upon the judgment.

[6,7] Appellant fails to consider the distinction between collateral and direct attacks upon a judgment, which is, "that in the former the record alone can be inspected, and is conclusively presumed to be correct, while on direct attack the true facts may be shown, and thus the judgment itself, on appeal, may be reversed or modified." *Lyons v. Roach*, supra. The result of this well settled rule is that unless the invalidity of a judgment is apparent from the record, the court rendering it, in the absence of an application made within the time specified in section 473 of the Code of Civil Procedure, is powerless to make any order modifying or vacating the judgment. The sole remedy of the aggrieved party can be found only in a new action. *People v. Davis*, 143 Cal. 673, 675, 77 P. 651.

No contention has been made by either of the parties as regards the timeliness of appellant's petition (*People v. Davis*, supra; *Richert v. Benson Lumber Co.*, 139 Cal. App. 671, 34 P.2d 840; *Hall v. Imperial Water Co.*, 200 Cal. 77, 251 P. 912; *Smith v. Jones*, 174 Cal. 513, 163 P. 890), therefore we do not feel that it is incumbent upon this court to inject in this appeal (other than as already mentioned) what undoubtedly is a further fatal defect in appellant's case.

The order is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.

59 Cal.App.2d 16

**TUMAN v. BROWN et al.**

**Civ. 6774.**

District Court of Appeal, Third District,  
California.

May 29, 1943.

**1. Attachment §360**

The statutory provisions requiring officer making levy under attachment to release the property when claimed by third party, unless plaintiff after written demand gives such officer an undertaking, are for benefit of the officer, and hence failure to give bond does not, in absence of written demand therefor, result in the abandonment of the attachment by the creditor so as to free the creditor from liability for wrongful attachment. Code Civ.Proc. §§ 689, 689.5; Pol.Code, § 4166.

**2. Appeal and error §1033(7)**

In action for wrongful attachment, error, if any, in finding there was no abandonment of attachment by creditor because of lack of written demand by sheriff for a bond, was not reversible error, since attaching creditor could not be prejudiced if finding afforded him the benefit of considering that he participated in disposition of the property under mistaken view that he had a right to do so by reason of his attachment, rather than that he was a willful tort-feasor. Code Civ.Proc. §§ 689, 689.5.

**3. Conspiracy §8**

In action against attaching creditor and third party claimant for damages to attached property resulting from defendants' alleged conspiracy to convert property to their own use, where evidence was sufficient to establish the conversion, question as to extent of liability of attaching creditor for acts of sheriff or keeper was immaterial. Code Civ.Proc. §§ 689, 689.5.

**4. Attachment §374**

**Conspiracy §19**

In action against attaching creditor and third party claimant for damages for wrongful attachment, conspiracy, and loss of attached property by fire, evidence established that property belonged to plaintiff, that attaching creditor deliberately failed to give plaintiff notice of purported release of attachment, that defendants conspired to exercise dominion over attached

property and actually did so without plaintiff's consent, and that defendants' subsequent negligence resulted in the loss by fire. Code Civ.Proc. §§ 689, 689.5.

**5. Conspiracy §14**

The major significance of "conspiracy" lies in the fact that it renders each participant in the wrongful act responsible as a "joint tort-feasor" for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of degree of activity.

**6. Appeal and error §1012(1)**

The trial court is the sole judge of the weight and sufficiency of the evidence.

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Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Edward E. Tuman against F. H. Brown and Albert J. Rupley to recover damages for wrongful attachment of a lumber mill and lumber and for loss of property resulting from defendants' alleged conspiracy to convert to their own use plaintiff's property and business, and for loss of property by fire resulting from defendants' negligence. From a judgment for plaintiff against both defendants, defendant Albert J. Rupley appeals.

Affirmed.

Lyon & Roberts and Henry S. Lyon, all of Placerville, for appellant.

Thomas Maul, Richard Barry, and C. W. Pearson, all of Placerville, for respondent.

PEEK, Justice.

This is an appeal from an award in favor of plaintiff Edward E. Tuman and against the defendants F. R. Brown and Albert J. Rupley. The defendant Rupley alone appeals from the judgment. Three separate actions as well as attachments and third party claims were filed involving the parties to the present suit, which proceedings were consolidated at the time of trial, and as a consequence the record is somewhat involved. Also the record is indefinite as regards the early history of the present controversy. However, appellant states that it is of no importance for it is only of slight consequence to this appeal, but respondent, to the contrary, believes that it is, and it is from his brief that we find the only information concerning those



facts which help to provide the background of the present litigation.

The respondent, in his brief, states that originally a controversy arose between Rupley, the appellant herein, and George and Edward Tuman, father and son respectively, concerning George's operation of his sawmill. As a result of the discord Rupley filed an action against Edward and attached certain lumber at his planing mill which Rupley claimed he had sold to Edward. That attachment is one of the two involved in the present appeal. George filed a third party claim to the lumber alleging that it had been delivered on consignment to his son Edward. At the hearing of George's third party claim the trial court found that both George and Rupley were wrong, that it did not belong to Rupley nor was it on consignment to Edward, but in fact it had been sold outright to Edward. Thereafter another third party claim and further law suits were filed. When Rupley filed the original action he also made a request for a keeper. Unfortunately the sheriff placed one of the litigants, F. H. Brown, in charge. Brown had been the former owner of the planing mill site and of the equipment in the mill, but prior to any of the litigation herein he leased the premises to Edward and sold him all of the equipment. Shortly after Brown assumed his duties as keeper he intervened in Rupley's action with the filing of a third party claim, by which he claimed all of the equipment in Edward's mill. He also filed an action to declare a breach of his agreement with Edward, alleging numerous irregularities in Edward's conduct of his business and defaults under the terms of the agreement. This action, according to what we have been able to discover in the record, did not come to light until shortly before the trial.

Chaotic is probably a proper adjective to mildly describe the ultimate conditions which resulted from the filing of Brown's third party claim. The sheriff did not serve written notice upon Rupley in accordance with section 689 of the Code of Civil Procedure but orally informed Rupley's attorney that Brown had filed a third party claim. Nor was any written notice ever served in accordance with said section. Edward had no knowledge of these matters until some time later. No action was taken by anyone to remove Brown as keeper. The sheriff testified that Brown remained in that capacity and that he so con-

tinued until the premises were destroyed by fire.

Following the fire Edward, apparently provoked with the turn of events or tired of always being so consistently on the defensive, took the offensive and filed an action against both Brown and Rupley to recover damages for the value of the mill and the lumber and for the loss of profits. Edward alleged in his complaint that Rupley and Brown had conspired to convert to their own use his mill, his lumber and his business, that they had operated the mill and sold the lumber, and that by reason of their negligence in the operation of the mill the remaining lumber was destroyed.

At the conclusion of the trial the court awarded damages against the defendants in the sum of \$7,267.06, which was the total of the following amounts: \$1,900 for the loss of the planing mill, \$4,867.06 for lumber and materials, and \$500 for loss of profits.

The appellant now contends in this appeal that when he failed to file a bond against the third party claim of Brown that the attachment was automatically released. That even though the attachment was not released and was in force he, as the attaching creditor, was not responsible for the unauthorized acts of the keeper who had been placed in charge by the sheriff. And, lastly, that there is no competent evidence to support the finding of the court that appellant and defendant Brown conspired together nor is there any competent evidence of a direct participation by appellant in the operation of the mill or the sale of lumber by Brown.

[1] It is the contention of appellant that the provisions of section 689 of the Code of Civil Procedure with respect to the written demand by the sheriff for a bond, which section in part reads as follows: "*If personal property levied on is claimed by a third person \* \* \* the officer making the levy \* \* \* must release the property unless the plaintiff, or the person in whose favor the writ runs, within five days after written demand by such officer, gives such officer an undertaking \* \* \*.*" (Italics ours.), are solely for the benefit of the attaching creditor, and therefore may be waived by virtue of the terms of section 3513 of the Civil Code. Respondent denies that such is the case, but rather that the provisions of said section are for the benefit of the sheriff, and therefore could not be waived by the appellant.

Further answering appellant, respondent suggests that if Rupley is correct in his first contention then many inequitable situations would invariably result, and by way of illustration in his brief cites what he terms "Legal Larceny."

"A may attach a horse of B, and C might then file a third party claim, whereupon, by connivance between A and C, A refuses to file an undertaking, and if the horse were not returned to B, he, under the law, receives no notice of the third party claim, C would be given the horse and ride contentedly off the property of B, who has never had an opportunity to protect his rights."

He further maintains that such could not be the law, yet, if the contention of appellant were carried to the ultimate, that such inequitable situations would be the inevitable consequences.

It is respondent's further answer to appellant's suggested construction that although section 689.5 of the Code of Civil Procedure, which reads as follows: "*Whenever, under Section 689 of this code a third party claim has been filed as to property levied on and the plaintiff has failed to furnish or maintain a sufficient undertaking to authorize the levying officer to continue to hold the property and such officer is unable to find the defendant to deliver the property, the levying officer shall notify the defendant in writing at his last known address, and if within 10 days thereafter the levying officer is unable to locate the defendant he may return the property to the party filing the third party claim.*" (Italics ours.), was not enacted until 1941 and subsequent to the present action, that nevertheless its enactment was but the codification of the general rule which has been followed elsewhere. That while there is little assistance to be derived from the decisions in this state, nevertheless, such general rule being the accepted practice in other jurisdictions, and now having received sanction by the Legislature, it should be determinative of the question raised by respondent, and that therefore the defendant had a definite right to the property as well as notice of the result of proceedings taken in regard thereto.

It is true that other tribunals, although a third party claim was not involved, have enunciated the rule:

"That the attaching creditor may himself abandon the levy; but clearly there is nothing to prevent him doing so. However, it is equally clear that if he abandons

the attached property and intends that the sheriff shall return it to the possession of the owner, he cannot relieve himself of liability accruing thereafter until he notifies the owner of the abandonment and offers to restore it in substantially the condition existing at the time of seizure. \* \* \*

"It is clear that after the attachment \* \* \* the owners refrained from exercising dominion over it. They were deprived of the use \* \* \* and, until by actual notice they were informed of the cancellation, they had a right to assume the sheriff still exercised dominion over the crop." Kelly v. Stockgrowers Credit Corporation, 66 N.D. 209, 263 N.W. 717, 719, 103 A.L.R. 460.

As was also stated in Mosley v. Black, Tex.Civ.App., 110 S.W.2d 611, 613: "If the attachment is abandoned and dismissed, the plaintiff cannot escape liability except by restoring the property to its rightful owner, and, if he fails to do this, he is liable to the owner for any damages that may accrue by virtue of his failure to do so."

Neither sections 689 or 689.5 of the Code of Civil Procedure contain a provision as regards instructions to the sheriff under such circumstances, but section 4166 of the Political Code does, and under the latter section it has been held that plaintiffs' instructions to the sheriff must be in writing and that evidence of parol authorization is inadmissible. Sanford v. Boring, 12 Cal. 539; Robinson v. Baker, 35 Cal.App. 318, 169 P. 694.

Respondent then contends that it therefore becomes reasonable to assume in light of the foregoing, that Rupley's attachment remained in force and effect and that such was the case at the time of the fire.

[2] Even if the court erred in finding that there was no abandonment of the attachment by Rupley, because of the lack of a written demand for a bond, it would not constitute reversible error. The appellant could not be prejudiced if the trial court, by its finding, afforded him the benefit of considering that he participated in the disposition of the property under the mistaken view that he had a right so to do by reason of his attachment, rather than that he was a wilful tortfeasor acting without any color or claim of right.

[3] We find no merit in the second question raised by appellant. That is, the extent of liability of an attaching creditor for acts of the sheriff or keeper. The judg-

ment of the trial court is in no way predicated upon the theory of respondeat superior.

It would seem to be entirely immaterial on what grounds Rupley or Brown purported to be acting, if they in fact tortiously appropriated and disposed of the property of Tuman. The trial court found on what it undoubtedly considered as ample evidence that the defendants did convert the plaintiff's property to their own use. Therefore it would be of no consequence whether such acts were committed as attaching creditors, third party claimants or in their individual capacities. The only question to be determined is the one contained in appellant's last contention, was there sufficient evidence to support the court's finding of a conspiracy on the part of Brown and Rupley, and was there sufficient evidence to connect appellant in the operation of the mill?

Therefore, by reason of the disposition that is made of this final contention of appellant there is no need to determine in this record the other questions raised by appellant.

By reason of the voluminous testimony no useful purpose would be served by an extended review. Suffice it to mention portions of the testimony of the defendants and two disinterested witnesses.

The defendant Brown, when called under section 2055 of the Code of Civil Procedure, admitted the agreement with Rupley to convert the plaintiff's property to their use and their actual participation in the operation of the mill and the sale of the lumber.

"Q. Who got the money for the church lumber? \* \* \* A. I don't remember that—

"Q. Who got the money for that? A. I collected it and then turned it over to Mr. Rupley, his part of it at twelve dollars a thousand, and I kept the balance.

"Q. What was the twelve dollars a thousand for? A. That was by an agreement with Mr. Rupley for the lumber in the yard.

"Q. That that lumber came from the lumber that the sheriff had attached? A. Yes.

"Q. The sheriff at no time told you to let Mr. Rupley have this lumber, did he? A. No, he did not.

"Q. The sheriff at no time told you to operate the planing mill or told you you

could have the planing mill to operate? A. I never asked the sheriff about it.

"Q. He never told you to go ahead and operate it? A. No."

Brown further testified:

"Q. Now, Ed. Tuman never authorized you to go into possession of that mill, did he? A. No."

The appellant Rupley, himself, although a rather evasive witness, testified in answer to questions pertaining to his agreement with Brown concerning the sale of the lumber as follows:

"Q. Then if the lumber was sold, it was with your consent? A. Well, it probably was. \* \* \*

"Q. Did you ever have any of your lumber manufactured through the Ed. Tuman mill? A. Yes, they surfaced lumber for me several times.

"Q. After the attachment was filed \* \* \*? A. I think so."

Wm. L. Tatum, a trucking operator, residing in Sacramento, testified: "I was here visiting with Mr. Brown \* \* \* and Mr. Rupley came in during our visit. \* \* \* During the conversation I asked them if they were operating the mill; they said they had been. That the fire was quite a loss to Mr. Rupley. They talked as 'we'."

Mr. Jess Gage, a lumber broker in Sacramento, testified in part as follows:

"Q. You sold some (lumber) prior to the fire? A. I sold some for Mr. Tuman.

"Q. And after the fire, did you sell some? A. I did.

"Q. And who was paid for the lumber? A. Mr. Rupley.

"Q. How did you happen to sell that lumber? A. Mr. Rupley asked me to dispose of it.

"Q. And he told you who it belonged to? A. The supposition was that it was his.

"Q. Did he say anything about it? A. Yes, sir, he said he had some box lumber and wanted me to sell it.

"Q. Did you ever have any conversation with Mr. Brown or Mr. Rupley in the office at the mill and before the fire? A. I have talked to them a great many times up there.

"Q. Did either of them ever discuss their operation of the planing mill with you? A. Yes, sir.

"Q. Both Mr. Brown and Mr. Rupley? A. Yes.



"Q. What did they say about that? A. Mr. Rupley asked me sometime in 1939 if I would sell finished products that came out of the mill.

"Q. About when was this conversation to the best of your recollection? A. I would say it was possibly in June.

"Q. And who was present? A. No one present but Mr. Rupley and I. Mr. Rupley stated he was running the Plum Creek Mill, and he was going to move his mill down there and sell it, and wanted to know if I could sell his lumber?

"Q. Did you have a talk with Mr. Brown? A. Yes, sir.

"Q. About when? A. I would say it was sometime prior to the fire. \* \* \* At that time Mr. Brown told me he and Mr. Rupley were going to operate the mill that summer and in the fall were going to move the plant down to Mr. Rupley's place here in the flat and operate from that locality.

"Q. Did Mr. Rupley ever say anything about Mr. Brown operating the mill with him? A. They both told me they were in partners and were going to operate it together."

Further excerpts from the testimony might be quoted but such additional quotations would serve no useful purpose.

[4] The trial court, at the conclusion of the hearing, made extensive findings to the effect that the equipment in the mill had been purchased by Edward, and that such contract had been fully performed by him with all payments having been made; that Tuman had paid in full all the rentals for the use of the premises; that no breach of the contract had been made by Tuman; that Tuman owned certain lumber on the premises; that the failure to post bond by Rupley did not release his attachment, nor did such failure give Rupley or Brown the right to operate the mill or sell the lumber; that the failure to give notice to Tuman of the purported release or abandonment of his attachment was deliberate and with the intent to conspire with Brown to exercise dominion over the attached property; that Brown's third party claim was invalid; that Brown continued in possession and conspired with Rupley to operate the mill, and actually did so; that such actions on the part of the defendants were without Edward's consent, and without any right whatsoever; and lastly, that by their negligent operation of the mill it was consumed by fire.

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[5] It is apparent from a review of the record that the findings of the trial court were amply justified. "In an action for damages resulting from acts of conspirators, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." 5 Cal.Jur. 530. It therefore logically follows that the plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943.

Oftentimes there is an intrinsic difficulty in proving a conspiracy, and therefore it has been held from the nature of the acts done and the relation of the parties, the interests of the alleged conspirators, and other circumstances. *Revert v. Hesse*, supra.

[6] Here, however, we are presented with direct facts, concerning the relations, circumstances and interests of the conspirators. In other words substantial evidence was introduced to prove every material fact necessary to sustain plaintiff's allegations of conspiracy on the part of the defendants. At best, all that can be said as regards the testimony produced on behalf of the defendants, is that it accomplished nothing more than to present a conflict in the evidence to the trial court. No complaint has been made of the award by the court and therefore it must be taken as correct. The principle that the trial court is the sole judge of the weight and sufficiency of the evidence is too well settled to warrant repetition. *Norgard v. Estate of Norgard*, 54 Cal.App.2d 82, 128 P.2d 566. It is self-evident that the court determined such conflicts in favor of the respondent Tuman and against the defendants Brown and Rupley. It hardly would be possible to find a case more conflicting in its testimony than the present one. Particularly with so many varied and different interests consolidated in the one trial. It necessarily follows that if the rule above stated is to have any degree of efficacy in its application then no better instance could be found than the present for the court so to hold.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

59 Cal.App.2d 132

**MORRIS et ux. v. FORTIER et al.**  
Civ. 12400.District Court of Appeal, First District,  
Division 1, California.  
June 10, 1943.**1. Judgment** Ⓒ707

In action by heirs of driver of a truck-tractor who was killed when it collided with truck in which plaintiff's decedent was a passenger, brought against owner of truck, judgment granting recovery in favor of heirs was not "res judicata" on issue of freedom from negligence proximately contributing to accident on part of driver of truck-tractor, in an action brought by parents of passenger to recover for his death against owners of truck-tractor, since requisite identity of parties did not exist. Code Civ.Proc. §§ 1908, 1910.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

**2. Automobiles** Ⓒ244(36)

Physical facts consisting of position of truck and truck-tractor after a head-on collision did not indicate that the truck prior to the collision was on the wrong side of the highway and that its driver's negligence was the sole proximate cause of the accident, in view that the truck-tractor was much larger and many times heavier than the truck, and other physical conditions.

**3. Automobiles** Ⓒ245(13, 42, 59, 60, 64)

Evidence presented question for jury as to whether defendants' truck-tractor driver was guilty of negligence which alone or concurring with negligence of driver of truck was cause of head-on collision, so as to render defendants liable for death of occupant in truck where there were no eyewitnesses, physical condition of trucks after accident was not conclusive as to their position before accident, and physical facts supported inference that one or both vehicles was proceeding at an excessive rate of speed.

**4. Death** Ⓒ58(1), 103(1, 3)

Where all parties involved in head-on collision between two trucks were killed without regaining consciousness, and there were no eyewitnesses, a presumption of due care for their own safety existed in favor of each of parties, and as between

conflicting disputable presumption and conflicting inferences, it was for jury to determine which should prevail.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by D. F. Morris and Elizabeth Morris against W. J. Fortier and others to recover for death of plaintiff's son as result of highway collision between truck in which plaintiffs' son was riding and a truck owned by defendants and being operated by their employee. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

C. Ray Robinson, Willard B. Treadwell, Robert H. Walker, and Loraine B. Rogers, all of Merced, for appellants.

F. M. Ostrander, of Merced, for respondents.

PETERS, Presiding Justice.

Defendants appeal from a judgment awarding plaintiffs \$10,187.93 for the death of their son, Louis Morris. The jury verdict was for \$15,000 plus funeral expenses in an amount not fixed in the verdict but admitted at the trial to be \$187.93. As a condition to denying the motion for a new trial the trial court required that plaintiffs remit \$4,812.07. The remission was filed, the motion for new trial denied, and judgment entered in the amount above indicated.

The son, Louis Morris, was killed in a highway collision between a Ford truck in which he was riding and which his brother, Henry Morris, was driving, and a Diesel truck-tractor, with two large trailers attached, owned by defendants and being operated by their employee Lester Wilcox. Henry Morris was also killed in the accident, as was Lester Wilcox, the driver of the truck-tractor. At the time of the accident the Morris boys were employed by one Salter, owner of the Ford truck. Admittedly, Lester Wilcox was acting in the course of his employment with defendants, and they are sued as his employers.

The present action for the death of Louis was consolidated for trial with another action brought by the plaintiff father to recover for the death of Henry. In that action the jury returned a verdict for defendants. No appeal has been taken from the judgment entered on that verdict

and it has become final. It is quite clear from the jury's verdicts in the consolidated cases that the jury impliedly found that both Wilcox, the driver of the truck-tractor, and Henry Morris, the driver of the Ford truck, were guilty of negligence proximately contributing to the accident, but that Louis Morris, passenger with Henry, was free from fault. In a third action, separately tried, brought by the heirs of Wilcox against Salter, the employer of the Morris boys, the plaintiffs therein recovered a substantial judgment based on a jury verdict. In that action the jury must have found that Henry Morris was guilty of negligence and that Wilcox was free from fault. That judgment has become final without an appeal.

On the present appeal one of the major contentions of appellants is that the judgment in the action brought by the heirs of Wilcox, although between different parties, is *res judicata* in this action on the issue of Wilcox' freedom from negligence proximately contributing to the accident. Appellants further contend that the evidence introduced upon the present trial is insufficient, as a matter of law, to support a judgment for respondents.

[1] The contention that the judgment in the action brought by the Wilcox heirs against Salter is *res judicata* in this action is without merit for the reason that there does not exist the requisite identity of parties. This is demonstrated by the following summary:

Persons involved:

Henry Morris, driver of Ford truck, and employed by Salter. Louis Morris, passenger in Ford truck, and employed by Salter. Lester Wilcox, driver of truck-tractor, and employed by Fortier et al.

Actions involved:

1. Heirs of Wilcox v. Salter—in this action it was impliedly found that Wilcox was free from negligence, and that Henry Morris was guilty of negligence proximately causing the accident.

2. Father and mother of Louis Morris v. Fortier—in this action it was impliedly found that Wilcox was guilty of negligence proximately causing the accident; that the negligence, if any, of Henry Morris did not bar an action for the death of Louis, and that Louis, a passenger in the Ford truck was not guilty of contributory negligence.

It is apparent that the judgment in action #1 is inconsistent with the judgment in action #2, inasmuch as in #1 Wilcox was found not to have been negligent, while in #2 he was found to have been guilty of negligence. The Heirs of Wilcox v. Salter action was filed December 13, 1940, and judgment in favor of the Wilcox heirs rendered April 7, 1941. The present action was filed December 27, 1940, and the answer thereto on February 21, 1941. In December, 1941, appellants moved to file a supplemental answer setting up the defense of *res judicata*, which motion was denied on December 11th. The motion was renewed at the conclusion of the trial and again denied.

In an attempt to sustain their contention that the doctrine of *res judicata* is here applicable, appellants refer to the cases which hold that where an agent is found not to have been negligent in an action brought against him by the injured third party, that judgment is conclusive in favor of the principal when sued by the third party for the agent's negligence. *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171; *Triano v. F. E. Booth & Co., Inc.*, 120 Cal.App. 345, 8 P.2d 174; *Charles H. Duell, Inc., v. Metro-Goldwyn-Mayer Corp.*, 128 Cal.App. 376, 17 P.2d 781. However, if the judgment in the Third Party v. Agent action goes against the agent, in the action of Third Party v. Principal the latter is not bound thereby but may relitigate the question of the agent's negligence. 1 *Freeman on Judgments*, 5th Ed., § 469, p. 1029. The reason why the judgment in the Third Party v. Agent action, when adverse to the Third Party, is conclusive in the Third Party v. Principal action is that the tortfeasor is the agent and the principal's liability is derivative and the Third Party has had his day in court in the first action on the question of the agent's negligence. But when, in the first action, the agent is found to be negligent, that finding is not conclusive against the principal because he has not had his day in court on that issue. In the present case, in action #1 brought by the Wilcox heirs against Salter, it was found that Wilcox was free from negligence. But that adjudication cannot be held binding against the father and mother of Louis Morris in the action against the employer of Wilcox, for the obvious reason that the father and mother of Louis Morris have never had their day



in court on the issue of Wilcox' negligence. The father and mother of Louis Morris were neither parties nor in legal privity with the parties to the first action. §§ 1908 and 1910, Code Civ.Proc.; *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741; *Drummond v. Drummond*, 39 Cal.App.2d 418, 103 P.2d 217. They were in no legal position to appeal from the first judgment, not being parties thereto.

Appellants cite *Southern Pacific Co. v. City of Los Angeles*, 5 Cal.2d 545, 55 P.2d 847. That case, and the companion case of *Inyo Chemical Co. v. City of Los Angeles*, 5 Cal.2d 525, 55 P.2d 850, have nothing to do with the doctrine of *res judicata*. They involved a situation where the city of Los Angeles was sued in two separate actions by two separate plaintiffs for damages resulting from the breaking of a municipal aqueduct alleged to have been caused by the negligence of the city. In the *Southern Pacific Company* case the trial court found that the city was not negligent, and that the breaking was caused by an unforeseeable act of God. In the *Inyo Chemical Company* case a different trial judge, on substantially the same evidence, found that the negligence of the city was the sole proximate cause of the accident. Both cases were appealed, and both were before the Supreme Court at the same time. The Supreme Court first considered the *Inyo Chemical Company* case. It was held that the finding that the city was negligent was amply supported by the evidence. The cause was reversed solely on the issue of damages. The court then considered the *Southern Pacific Company* case in which the findings were in favor of the city. This judgment was reversed, the court stating (5 Cal.2d at page 548, 55 P.2d at page 849): "It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function

of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases."

Appellants argue that this case stands for the proposition that where there are conflicting judgments on substantially similar evidence, although between different parties, the first judgment to become final is *res judicata*. The case stands for no such proposition. The most that the case stands for is that when there are two cases growing out of the same facts in which conflicting judgments are rendered, and both are before the Supreme Court at the same time on appeal, the Supreme Court, contrary to the general rule, and in order to harmonize the decisions, will weigh the evidence to determine which of the two conflicting findings should prevail in both cases. Such a rule can have no application to the facts here involved. Here we have but one of the allegedly conflicting judgments before us on appeal. The judgment in the action by the Wilcox heirs against Salter has become final without appeal. The father and mother of Louis Morris were not parties to that action and could not have appealed therefrom. This court is not in a position to harmonize the two apparently conflicting judgments. If we were to weigh the evidence in the instant case, contrary to the general rule, and if we were to assume that the evidence in the first action was substantially similar, and then conclude that the one before us is correct and that the first case was erroneously decided, we would be without power to reverse that erroneous judgment. The rule announced in the *Southern Pacific Company* case, *supra*, constitutes an exception to the general rule prohibiting an appellate court from weighing the evidence, and can have application only when the two conflicting judgments are before the court at the same time on appeal.

Appellants next contend that the evidence, as a matter of law, is insufficient to support the judgment. The accident took place between 7 and 8 o'clock in the morning of December 6, 1940, on the main Valley Highway between Livingston and Delhi. For an appreciable distance both ways from where the accident occurred the highway is straight and practically level. The one and one-half ton Ford truck in which the Morris boys were riding was traveling south towards Livingston.

Wilcox was driving his Diesel truck, with two large inclosed trailers attached, north towards Delhi. The morning was very foggy and the highway was wet. Wilcox and Louis Morris died upon the scene, Henry Morris died later the same day without recovering consciousness. There were no living eyewitnesses of the accident. There were no marks on the highway by which the path of either truck immediately preceding the accident could be ascertained, other vehicles having obliterated such marks, if any, before the arrival of the officers. The truck-trailer was sixty feet long and eight feet wide. The Ford truck had an open box-like arrangement with side racks in which vegetables were being carried. The pavement at the scene of the accident is twenty-two feet in width, and has oiled shoulders on both sides. A white line is drawn down the center of the pavement.

Since the two trucks were proceeding in opposite directions, and since they met practically head-on, it is obvious that one of them was on the wrong side of the highway at the time of the accident. It is appellants' theory that the location of the two cars after the accident demonstrates, as a matter of law, that the Ford truck was the one that was being driven on the wrong side.

Because of the lack of any living eyewitness, the evidence was entirely inferential in character. The exact point of impact is unknown. Witnesses testified that after the accident appellants' truck was diagonally across the highway on the east side. The left front wheel was on the white center line, or just west of it, the balance of the truck being to the east of the center line. Inasmuch as Wilcox was proceeding north, that means that after the accident appellants' truck stopped on its right side of the highway. Pictures taken after the accident show, and several witnesses testified, that the front of the Ford truck was "wrapped around" the Diesel truck. After the accident the Ford truck was practically all on the easterly side of the highway; that is to say, on its wrong side. Only its right rear wheel was west of the center line. Its left rear wheel was on the white line. The wooden bed of the Ford truck was torn loose and tilted upright. The side racks of the Ford were torn loose and were lying on the west side of the highway. The crated vegetables were scattered along the highway for a distance of 133 feet south of

where the two vehicles stopped. These vegetables were almost entirely on the west side of the highway, most of the crates being along the west edge thereof. The photographs demonstrate that the force of the impact must have been terrific.

The above physical facts were testified to by two police officers who arrived at the scene shortly after the accident occurred, and by a third witness who lived a mile and a quarter away, and who heard the crash and proceeded to the scene. Many pictures were introduced showing these facts in graphic detail. Respondents also read into the record the evidence of Mabel Bolton given in the Wilcox action. She was unavailable at the time of the present trial and her testimony on the prior trial came in by stipulation. She resided in a house located on the side of the highway some 350 feet from the scene of the accident. She testified that just before the crash she was sitting by the window of the house combing her hair and looking out, having been attracted by the fog; that as she looked out she saw a small truck pass going south; that the truck was then on its right-hand side of the highway and was going about twenty miles per hour; that almost immediately thereafter she heard the crash; that no other car passed going south between the time she saw the truck pass and the time she heard the crash. It would seem clear that from Mrs. Bolton's testimony the jury was entitled to infer that the car she saw was the Ford truck, and that 350 feet from the accident that truck was on its right side of the highway going no more than twenty miles an hour.

[2] Appellants urge that, as a matter of law, this evidence demonstrates that the Ford was on the wrong side of the highway, and that such negligence was the sole proximate cause of the accident. Neither conclusion is sound. The evidence shows that 350 feet from the scene of the accident the Ford truck was proceeding on its right side of the highway at a lawful and relatively slow rate of speed. The position of the trucks when they came to rest does not conclusively establish either the relative positions of the trucks before the accident or where the accident occurred. The Diesel truck was much larger and many times heavier than the Ford truck. The presence of the vegetables 133 feet south of where the trucks stopped is some evidence that the large heavy Diesel truck

must have pushed the small Ford truck a considerable distance north from the point of impact. Undoubtedly, the force of the impact catapulted the vegetables forward for some distance, as urged by appellants, but it is a reasonable inference that the point of impact was some appreciable distance south of where the trucks finally stopped. That being so, the physical position of the two trucks after the accident is not conclusive as to their position before the accident.

There is also the matter of speed. The pictures and other evidence of the physical facts support the inference that one or both trucks was proceeding at an excessive rate of speed. Appellants argue that, even if the jury could have inferred that the Diesel truck was proceeding at an excessive rate of speed, such negligence could not have been the proximate cause of the collision; that the presence of the Ford on the wrong side of the highway was the sole proximate cause. If negligence can be inferred, then whether such negligence was a proximate cause of the accident is a question of fact for the jury. It must be remembered that it is not sufficient for appellants to show that Henry Morris was negligent—they must also show that, as a matter of law, Wilcox was not negligent. The jury apparently found that both Henry Morris and Wilcox were negligent.

[3,4] From the above evidence, although the inferences and presumptions therefrom are in conflict, we think the jury could reasonably have inferred or presumed that Wilcox was negligent and that his negligence alone or concurring with that of Henry Morris was the cause of the accident. In support thereof there is the evidence that 350 feet from the accident the Ford was proceeding at a lawful rate of speed on its own side of the highway. There is the evidence from which the jury could infer that both trucks were proceeding at an excessive rate of speed. There is also the presumption that Louis and Henry Morris were exercising due care for their own safety. That presumption also exists in favor of Wilcox, but as between conflicting disputable presumptions and conflicting inferences it is the function of the jury and not of the appellate court to determine which shall prevail.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

\* Subsequent opinion 140 P.2d 895.

**BARE v. RICHMAN & SAMUELS, INC., OF  
NEW YORK, N. Y.\***

Civ. 6780.

District Court of Appeal, Third District,  
California.

May 29, 1943.

Rehearing Granted June 26, 1943.

**1. Appeal and error ☞1039(9)  
Pleading ☞369(1)**

Where first cause of action was in assumpsit on contract to market grapes, and second was for conversion of grapes, trial court properly reserved ruling on motion to require plaintiff to elect until after introduction of evidence, and its inadvertent failure to pass upon the motion was harmless where court assumed that both causes were founded on assumpsit and depended upon the same set of facts and only one judgment was rendered for market value of the grapes.

**2. Corporations ☞432(12)**

Evidence did not support finding that local managing agent of corporate distributor's fruit packing shed had authority orally to modify written contract requiring distributor to sell grapes at the best possible price, so as to require sale for market value f.o.b. the shed, or that the alleged modification was accepted and ratified by the distributor.

**3. Contracts ☞238(2), 247**

A written contract under proper circumstances may be modified or replaced by a subsequently executed oral agreement, but such modification or substitution will be enforced only upon clear and satisfactory proof. Civ.Code, § 1698.

**4. Corporations ☞432(12)**

That local managing agent of corporate distributor's fruit packing shed, on behalf of distributor, had signed original written contract requiring distributor to sell grower's grapes at the best possible price, did not establish that agent had the authority orally to modify the contract or to substitute a contract requiring sale to be for market value f.o.b. the shed. Civ.Code, § 1698.

**5. Principal and agent ☞119(1)**

The presumption, in absence of evidence to the contrary, is that an agent empowered to make contracts for his principal is unauthorized to rescind or modify them.



**6. Factors** Ⓒ21

Where marketing contract required New York distributor to procure the highest possible price for California grower's grapes and contained no provision requiring grapes to be sold for market value f.o.b. distributor's California fruit packing shed, and no guaranty of prices, contract contemplated that the grapes might be sold in Eastern markets at public auction, and right was not reserved to grower to direct distributor's local managing agent to sell grapes for market value f.o.b. the shed.

**7. Factors** Ⓒ42

Where marketing contract requiring distributor to procure the highest possible price for grower's grapes was not shown to have been modified so as to require sales to be for market value f.o.b. distributor's fruit packing shed, such value was not controlling as respects grower's right to recover from distributor the unpaid balance of the alleged "market value" of the grapes at the shed.

**8. Factors** Ⓒ42

That six carloads of grower's grapes were sold by distributor in Eastern markets for \$27.50 per ton did not establish that all grower's grapes were accepted by distributor with a guaranty of market value of \$27.50 f.o.b. distributor's fruit packing shed, where marketing contract required distributor to procure the highest possible price for grower's grapes.

**9. Factors** Ⓒ21

Where written marketing contract required distributor to procure the highest possible price for grower's grapes, distributor's telegrams to local managing agent of its fruit packing shed, giving information to growers generally that grapes could be sold \$27.50 net, and that distributor would work hard trying to sell grower's grapes f.o.b. \$27.50 local, was not an "acceptance" or "ratification" of proposed oral modification of written contract to require grapes to be sold for market value f.o.b. the shed.

See Words and Phrases, Permanent Edition, for all other definitions of "Acceptance" and "Ratification".

**10. Contracts** Ⓒ247

Proof of a subsequent oral modification of a written contract must be clear and satisfactory.

**11. Factors** Ⓒ21

Under statute previous stipulations were deemed to have been included in the

written marketing contract between grower and distributor, and hence where contract failed to include grower's alleged stipulation that grapes be sold for market value f.o.b. distributor's fruit packing shed, and required distributor to sell at the best possible price, grower was not entitled to the unpaid balance of the alleged "market value" of the grapes at the shed. Civ.Code, § 1625.

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Assumpsit by George Bare against Richman & Samuels, Inc., of New York, N. Y., and another, upon an alleged oral agreement modifying a written contract to market grapes, and for conversion of grapes, wherein a cross-complaint was filed. From a judgment for plaintiff, named defendant appeals.

Reversed.

Frank C. Lerrigo, of Fresno, and Sanford Solarz, of New York City, for appellant.

Edward T. Taylor, of Modesto, for respondent.

THOMPSON, Justice.

The defendant, Richman & Samuels, Inc., has appealed from a judgment of \$2,224.10 and interest, which was rendered against it in a suit in assumpsit upon an alleged oral agreement modifying a previous written contract to market grapes in consideration of a stipulated percentage of the purchase price thereof. The complaint contains a second cause of action based on alleged conversion of the grapes. The court found that the local managing agent of the corporation orally agreed, with the consent of the company, to sell the grapes f.o.b. Turlock, California, for the market price thereof, which was determined at the trial to be \$27.50 per ton. The judgment was rendered on the theory that the oral agreement of the agent was subsequently ratified by the principal and constituted a binding modification of the original written contract.

The defendant, Richman & Samuels, Inc., is a marketing corporation having its home office in New York City. It operated a fruit packing shed at Turlock, California, which was in charge of the defendant, Frank C. Belier. The plaintiff owned and operated a vineyard in Stanislaus County. July 3, 1935, Frank C. Belier, in behalf

of the corporation, called the "distributor," executed a written contract with the plaintiff, who is referred to as to the "grower," by the terms of which the plaintiff "appoints the distributor his agent with exclusive right to market fifteen cars of Alicante Buschet grapes \* \* \* to be delivered to the distributor during the season of 1935." That contract contains the following covenants:

"For and in consideration of the covenants herein provided to be kept and performed the grower hereby irrevocably appoints the distributor his agent with exclusive right to market fifteen (15) cars of Alicante Buschet grapes. \* \* \* The grower agrees to deliver at a shipping point *to be designated by the distributor*, to be marketed by the distributor in accordance with the terms, conditions and for the compensation set forth in this agreement. \* \* \*

"The distributor agrees to use his best efforts to sell said grapes at the best possible price, agreeing \* \* \* To make prompt settlement with the grower, from receipt of returns from sale of the said grapes at its office in Turlock, California. \* \* \*

"The grower agrees to pay the distributor a reasonable packing and loading charge. The grower agrees to pay to the distributor a selling or marketing charge of seven per cent of the gross sales on all auction and delivered sales and ten per cent on all f.o.b. sales.

"To irrevocably assign to the distributor for collection any claim or interest therein that it may have against any carrier, arising out of the transportation of said fruit, \* \* \*.

"All moneys advanced by the distributor, or charges incurred in the handling of said fruit for transportation, selling commissions, loading and packing, \* \* \* shall be first charges against the proceeds of said fruit, and shall be deducted by the distributor therefrom. \* \* \*

"When fruit of the grower is loaded in cars with fruit furnished by other growers, such cars may be handled as a car pool and distributor may sell such car, or cars, as a unit without discriminating between the various growers' lots and the returns for the sale thereof may be prorated on a car pool basis, or upon the basis of lots according to sizes and grades as may be determined by distributor.

"The distributor's inspector shall be the sole judge of the quality of the fruit furnished by the grower as complying with this contract and as being proper for Eastern shipment.

"Should market conditions be such that any variety of fruit shipped will not, in the opinion of the distributor, pay charges the grower will not render such grapes for shipment and the distributor shall not be obligated to accept such fruit. \* \* \*

"This contract is agreed and understood as containing the entire contract between the parties hereto, \* \* \* it being particularly understood that no representation has been made or relied upon by either party hereto not incorporated herein."

Incident to the foregoing contract, and referred to therein, the plaintiff also executed to the corporation a crop mortgage on the grapes produced on his Stanislaus County ranch as security for all money advanced or paid by the distributor to the producer under the terms of that agreement. The distributor advanced the sum of \$1,500 to the plaintiff. The mortgage contains this language: "It is further agreed that the distributor may sell and dispose of the said crop either at public auction or private sale with or without notice to the grower."

The plaintiff delivered to the marketing company's packing house at Turlock, six carloads of grapes between the dates of October 8 and 14, 1935, which were sold by the distributor for a price equal to the market value thereof at Turlock, which was determined to be \$27.50 per ton, net. Nine other carloads of grapes were delivered by the plaintiff to the distributor at its packing house in Turlock on October 15, 16 and 17, 1935. These nine carloads of grapes were accepted by the defendants pursuant to the terms of the agreement, shipped by them and sold in Eastern markets. Two of the carloads were shipped to a prospective purchaser in New York, who failed or refused to accept delivery, and they were subsequently sold at auction for a comparatively small price. On the theory that the modified contract was executed by the delivery, acceptance and sale of the grapes, the plaintiff claims he is entitled to recover the market value of the grapes f.o.b. Turlock.

The plaintiff brought suit against the marketing company and Frank C. Belier, its local managing agent in charge of the Turlock packing house, for the unpaid

balance of the alleged "market value" of the grapes at Turlock. The complaint contains two causes of action. The first count recites the execution of the previously-mentioned written contract, which is attached to the pleading as exhibit "A" and made a part thereof. It is then alleged the fifteen carloads of grapes were delivered to the defendants at Turlock "pursuant to the terms of said marketing contract," as modified, specifying the dates of each delivery from October 8 to 17, 1935. The complaint states that "plaintiff delivered each and every carload of said grapes as aforesaid, to said defendant Frank C. Belier with the definite and positive instructions of plaintiff to sell all of said grapes f.o.b. Turlock, California; that the f.o.b. market price of said grapes at Turlock \* \* \* was and remained at the sum of \$27.50 per ton net. That said defendant Frank C. Belier, accepted said grapes and all thereof and promised and agreed to sell the same f.o.b. Turlock." It is then alleged on information and belief that all of said grapes were sold "in accordance with the instructions of plaintiff" for the sum of \$27.50 per ton net. Judgment was demanded in the sum of \$2,224.10 and interest from October 17, 1935.

The second cause of action alleges the delivery to the defendants for sale of the same fifteen carloads of grapes but asserts that the defendants, and each of them, "converted the said grapes" and appropriated them to their own use without the knowledge or consent of the plaintiff, to his damage in the sum of \$3,728.19, no part of which was paid.

A general and special demurrer to the complaint was overruled. The marketing company answered the complaint denying the material allegations thereof. It also filed a cross-complaint for reimbursement of the sum of \$60.78, alleged to have been expended in behalf of the plaintiff, no part of which was paid.

The court adopted findings favorable to the plaintiff in every respect, except that it was not determined that the grapes, or any part of them, were converted or appropriated by the defendants. The court specifically found that Frank C. Belier was the duly authorized agent of the marketing company with the power to, and that he did, modify the written marketing contract and that the defendants accepted them f.o.b. at Turlock and sold them for \$27.50 per ton net, which was the market

value thereof. Judgment was rendered against the corporation only for the sum of \$2,224.10 and interest from August 26, 1936. From that judgment the marketing company has appealed.

It is contended the findings and judgment are not supported by the evidence; that there is not sufficient proof that the market value of the grapes was \$27.50 per ton net at Turlock; that there is no evidence that Frank C. Belier was authorized as the marketing company's agent, to, or that he did, rescind or modify the written contract as alleged by the plaintiff, or at all, and that the court erred in receiving oral evidence, over the objection of the defendants, tending to prove either a novation or a modification of the original written agreement.

[1] The appellant contends that the court erred in failing to require plaintiff to elect whether he would rely upon his first cause of action in assumpsit, or upon the second cause of action for alleged conversion of the grapes, since the first cause is founded on contract and the second upon tort and that the two counts are inconsistent and irreconcilable. *Bank of America N. T. & S. Ass'n v. Hill*, 9 Cal.2d 495, 71 P.2d 258. The court properly reserved its ruling on that motion until the introduction of the evidence was completed. The court inadvertently failed to pass upon that motion. That omission was, however, harmless, since the court assumed that both counts were founded on assumpsit and depended upon the same set of facts and adopted findings accordingly. The court did not find that the grapes had been converted. Moreover one judgment only was rendered for the market value of the grapes and interest thereon. Under such circumstances it has been held the defendants are not prejudiced by a failure to require the plaintiff to elect his remedy as between two causes of action. *Bank of America N. T. & S. Ass'n v. Hill*, *supra*; *Glantz v. Freedman*, 100 Cal.App. 611, 280 P. 704.

[2] We are of the opinion the evidence does not support the findings and judgment to the effect that the original marketing contract, which by clear and unambiguous terms provided merely that the "distributor agrees to use his best efforts to sell said grapes at the best possible price," was subsequently modified so as to require the sale of the grapes for "market value f.o.b. Turlock." There is no substantial evidence that Frank C. Belier, the "local manager"



of the corporation, had authority to so modify the contract, or that the alleged modification was accepted or ratified by the marketing company. The plaintiff assumed that he had a right to direct the marketing agent how to sell and where to sell and the price for which he should sell the grapes. But the reservation of those rights is in conflict with the terms of the written contract.

[3] It is true that a written contract, under proper circumstances may be modified or even replaced by a subsequent executed oral agreement between the parties. Sec. 1698, Civ.Code; *State Finance Co. v. Hershel California Fruit Products Co.*, 8 Cal.App.2d 524, 47 P.2d 821; *Curtiss v. Starr*, 85 Cal. 376, 24 P. 806; 6 Cal.Jur. 375, sec. 226; 17 C.J.S., Contracts, p. 866, § 377b; 2 Williston on Contracts, rev. ed. 1702, sec. 591; 1 Witkin's Summary of Calif. Law, p. 100. But such modification or substitution of a written contract by a subsequent oral agreement will be enforced only upon clear and satisfactory proof. *Houghton v. Lawton*, 63 Cal.App. 218, 223, 218 P. 475; *Columbia Casualty Co. v. Lewis*, 14 Cal.App.2d 64, 72, 57 P.2d 1010; *Mackenzie v. Hodgkin*, 126 Cal. 591, 597, 59 P. 36, 77 Am.St.Rep. 209.

[4,5] Frank C. Belier, the "local manager" of the marketing corporation, did not have the authority to bind that company by his agreement to modify the written contract by a subsequent oral agreement to require the grapes to be sold for market value f.o.b. Turlock, contrary to the express terms of the written contract, without the consent or ratification of the corporation. The testimony of Louis Richman, taken from his deposition which was read in evidence, is positive in that regard. The plaintiff recognized that fact. He testified that when he told Mr. Belier to sell the grapes f.o.b. Turlock that Belier informed him he had notified Richman & Samuels, Inc., to that effect. The fact that Frank C. Belier signed the original written contract in behalf of the corporation is not satisfactory proof that he had the authority to modify or substitute another contract to bind the corporation without its consent or ratification. The record indicates clearly that Belier was merely the "local manager" without authority to modify or change contracts. The presumption of law, in the absence of evidence to the contrary, is that an agent who is empowered to make contracts for his

principal is not authorized to rescind or modify them. *State Finance Co. v. Hershel California Fruit Products Co.*, supra; *Thomas v. Anthony*, 30 Cal.App. 217, 222, 157 P. 823, 824; 6 Cal.Jur. 374, sec. 225. In both of these last cited cases the principle of law is stated that: "'Presumptively an agent is employed to make contracts, not to rescind or modify them; to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal \* \* \* unless the principal knew or approved of such modifications by the agent.'"

[6] In the present case the written contract contained no provision requiring the grapes to be sold for market value f.o.b. Turlock. It was a mere consignment of grapes to be sold in consideration of stipulated commissions. The contract contained no guarantee of selling prices. It merely provided that the distributor would use his best efforts to procure the highest possible price. It clearly contemplates that the grapes might be sold in Eastern markets at public auction. A reasonable construction of the contract precludes the inference that the plaintiff reserved the right to direct the agent to sell the grapes for market value f.o.b. Turlock.

[7] It is true that several carloads of grapes were sold for \$27.50 per ton. There is some evidence to the effect that \$27.50 per ton was the market value of grapes at Turlock during the time of deliveries of the fifteen carloads which are involved in this suit. In view of our conclusion regarding the merits of this case, it is not necessary for us to determine whether there is adequate evidence of the market value of the grapes f.o.b. at Turlock. We think such market value is not controlling. The evidence of an alleged modification or substitution of the original written contract is unsatisfactory. It consists chiefly of the testimony of the plaintiff. Mr. Belier, the agent, was not called as a witness. He was absent from the county at the time of the trial. Evidently he was employed elsewhere by another fruit industry. There is evidence that he moved to the town of Biggs, north of Sacramento.

The plaintiff did not testify to a specific date when the consignment contract was modified or substituted by the alleged oral

agreement. His evidence seems to indicate that, contrary to the terms of the written contract, he assumed he had a right at any time to direct the sale of his grapes for market value f.o.b. Turlock, and that he so instructed the agent, Belier. He testified in that regard:

"[The Court] During all the shipping season you went upon the basis that it was f.o.b. \$27.50? A. Right. It was all sold f.o.b. I didn't question the price. \* \* \* I thought if I could get \$27.50 a ton or even less f.o.b. I would be willing to take it."

The plaintiff admitted that he read the written contract before he signed it and that he knew it did not provide that the grapes should be sold f.o.b. Turlock. He said in that regard:

"Q. You read this contract before signing it? A. I did, yes sir. \* \* \*

"Q. And you also knew there was no provision in there that growers reserved the right to determine how the car should be sold? A. That right was given to me, I had that right, they were my grapes.

"Q. You knew it was not given to you in the contract? A. It didn't have to be, it was always mine, it was my property, I had a right so say how they should be sold unless I give that right away. I didn't give the right away, I reserved that right."

Evidently the plaintiff was mistaken in that regard. The right to determine how the grapes were to be sold was not reserved in the contract. The contract consigned the grapes to plaintiff's marketing agent to be sold, without reserving the right to require them to be sold for market value f.o.b. Turlock, or otherwise. The contract is silent regarding the manner, price or place where the grapes were to be sold.

The plaintiff testified that "We entered into this contract with the idea of selling grapes f.o.b. We started operating, selling f.o.b. and my conversation to him [Mr. Belier] at all times was 'sell f.o.b.'"

Regarding plaintiff's instructions to Belier to sell the grapes f.o.b. Turlock, this colloquy occurred:

"Q. When were these instructions of yours given to Belier? \* \* \* A. All through the season and before we entered into the contract, sell them f.o.b., that was the idea of giving them 15 cars to sell for me, f.o.b.; nothing else in mind.

"Q. Why didn't you have that put in the contract? \* \* \* A. It wasn't necessary."

[8] It is true that six carloads of grapes were sold in Eastern markets for \$27.50 per ton, but that does not mean those grapes were accepted by the distributor with a guarantee of market value of \$27.50 f.o.b. Turlock.

Assuming that the plaintiff instructed Belier, the agent, to sell them for market value f.o.b. Turlock, and that those instructions were conveyed to the corporation in New York, there is no satisfactory proof that modification or change of the written contract was accepted or ratified. Mr. Richman testified positively that the corporation did not accept or ratify that demand. The only evidence offered to prove acceptance or ratification of that change of contract consisted of the evidence of the attorney for plaintiff who testified that on January 28, 1936, he made memorandums of certain telegrams from the corporation to Mr. Belier, which he read in his office in the presence of plaintiff and Belier's secretary. On the theory that the original telegrams were lost or could not be procured, the attorney was permitted over objections to testify to their contents. The first message dated October 10, 1935, two days after the first load of grapes was delivered to Belier, reads:

"We have good market & you can tell growers can sell cars US-1 Alicante Carignan 27.50 net perhaps more."

It is true the first six carloads were actually sold in Eastern markets for \$27.50 per ton. But evidently this message had no application to plaintiff's instructions to Belier to change the contract so as to guarantee market price f.o.b. Turlock. It does not even refer to George Bare's contract. It is merely information to growers generally.

October 15th another message was received by Belier, which reads:

4 cars

"We sold AOOAF Bare Alicante 27.50 5 cars

ACEQA net have AOOAB open [unsold] will work hard trying to sell them today you explain this to Bare tell him not to worry that will work hard sell his grapes f.o.b. Quote \$27.50 local."

[9, 10] This telegram does not purport to be an acceptance of a proposed change in the written contract. It does not refer

to either the contract or a proposed change thereof. It appears to be a mere message of encouragement in which the agent says, in effect, that he will work hard "trying to" sell his grapes f.o.b. Then it says "Quote \$27.50 local." We are unable to construe these messages as an acceptance or ratification of a proposed modification of the written contract. The evidence in this case fails to meet the requirement of the law that proof of a subsequent oral modification of a written contract shall be clear and satisfactory.

[11] The effect of the evidence of the plaintiff that he informed defendants "before we entered into the contract" that the grapes must be sold for market value f.o.b. Turlock is that the written contract failed to include his alleged stipulation regarding the selling price of the grapes. All previous negotiations and stipulations are deemed to have been included in the written contract. Sec. 1625, Civ.Code; 12 Am. Jur. 755, sec. 232.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., and PEEK, J., concurred.



59 Cal.App.2d 165

**In re BENDELL'S ESTATE.  
BENDELL v. BENDELL.  
Civ. 13882.**

District Court of Appeal, Second District,  
Division 3, California.  
June 11, 1943.

**1. Wills ⚡191**

Where testator's will made no provision for his widow whom he married after execution of will, the will was inoperative as to the widow. Probate Code, § 70.

**2. Wills ⚡191**

A marriage by testator subsequent to execution of will has effect of revoking will only as to the surviving spouse. Probate Code, § 70.

**3. Wills ⚡191**

Where testator remarried after executing will devising to a friend one-half interest in testator's residence and devising and bequeathing to testator's son all rest of property, the widow took one-half of the estate, the friend took the one-half interest in residence property which widow did not take and the son took residue of estate. Probate Code, § 70.

**4. Wills ⚡435**

It is duty of court to give effect to expressed wishes of testator as completely as possible, but court cannot rewrite testator's will.

**5. Wills ⚡191**

Where testator remarried after executing will devising to friend one-half interest in testator's residence and devising and bequeathing to testator's son all residue of property, expense of upkeep and improvements should have been deducted from gross rentals which went to the widow and the friend rather than from the residue.

**6. Stipulations ⚡14(1)**

Stipulation of testator's widow, son and friend, who was devised interest in testator's residence, was properly construed as providing that friend's share of proceeds should be subject to no charges except as might properly have been made against his interest if realty had not been sold, so that no part of administratrix' compensation for extraordinary services in connection with sale of residence and expenses of sale were chargeable against the friend's share.

Appeal from Superior Court, Los Angeles County; Clarence L. Variel, Judge pro tem.

Proceedings in the matter of the estate of Charles C. Bendell, deceased, wherein Nellie V. Bendell was appointed administratrix with will annexed and William W. Bendell contested the will which named Clarence Ayres as a devisee. From the judgment decreeing distribution of the estate, William W. Bendell appeals.

Judgment modified, and as modified, affirmed.

Chandler & Wright and Oliver S. Northcote, all of Los Angeles, for appellant.



Vernon W. Hunt, of Los Angeles, for respondent Clarence Ayres.

SHINN, Acting Presiding Judge.

Charles C. Bendell, when 80 years of age, made a will by which he devised to a friend, Clarence Ayres, a one-half interest in his residence and devised and bequeathed to his son all the rest and residue of his property. Eight months later he married and some three and a half years after his marriage he died. He made no provision for his wife by marriage contract nor was she provided for or mentioned in the will. She was appointed administratrix with the will annexed. During proceedings in probate the residence property was sold, the administration was closed, and the estate was distributed, one-half thereof, amounting to \$2,035.14, to the widow, the sum of \$1,460.14 to Clarence Ayres, "being one-half of the value of the sale of real estate devised to him plus one-half of rental therefrom, without deduction of any charges of administration expense" and the residue, amounting to some \$670, to the son, William W. Bendell, who prosecutes this appeal from the order settling the final account and decreeing distribution. The appeal is upon the judgment roll.

[1] The widow's right to take one-half of the estate results from the fact that the will was inoperative as to her by virtue of section 70 of the Probate Code, which reads as follows: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

[2] In support of his contention that the will was revoked in its entirety by the testator's marriage, appellant argues for a construction of said section 70 which would bring about that result. The section incorporates former sections 1299 and 1300 of the Civil Code, with the addition of the words "as to the spouse" following the word "revoked." Under the former sections marriage worked a revocation of the will as to all persons. In re Estate of Ryan, 1923, 191 Cal. 307, 312, 216 P. 366; In re Estate of Meyer, 1919, 44 Cal.App.

289, 186 P. 393; Sanders v. Simcich, 1884, 65 Cal. 50, 52, 2 P. 741. Section 70 clearly means that a subsequent marriage has the effect of revoking the will only as to the surviving spouse. In re Estate of Piatt, 1943, 57 Cal.App.2d 211, 134 P.2d 321; In re Estate of Russell, 1941, 43 Cal. App.2d 319, 321, 110 P.2d 718; In re Estate of Haselbud, 1938, 26 Cal.App.2d 375, 79 P.2d 443.

[3] We need not consider what the result would be if by reason of the operation of section 70 the testamentary scheme as expressed in the will should be entirely defeated or rendered impossible of execution. We have not such a case. There is no conflict between the rights of the surviving spouse and those of the two beneficiaries under the will; Ayres can still take the one-half interest in the residence property which the widow does not take and appellant can take the residue of the estate. To deny that this would be a valid disposition of the half of the estate upon which the will may operate would be to devitalize the amendment of the governing sections and to strike down what remains of the testator's original plan to dispose of his estate. We have no right to look beyond the will to ascertain what the wishes of the testator were. It may be that if he had written another will after his marriage he would have provided for his son more generously, but all that we know is that he had ample opportunity to change the will and failed to do so. We are obliged to look upon the will as if the testator had reread it after his marriage with full knowledge of his wife's rights under the circumstances and had then elected to make no change in it.

[4] Appellant's second contention is that because of the widow's having taken a half interest in the residence property, the will should be so construed that he and Ayres would share equally in the other half, because the testator originally intended their interests in the property to be equal. Such a construction, it is contended, would give the greatest possible effect to the will and the desires of the testator, as expressed therein, as between appellant and Ayres, after giving due recognition to the rights of the widow. That it is the purpose of the law and the duty of the court to give effect to the expressed wishes of the testator as completely as possible in these circumstances, is not to be doubted (In re Estate of Munson, 1942, 54 Cal.App. 2d 590, 592, 129 P.2d 420, and cases there

cited; *In re Estate of Piatt*, supra, 57 Cal. App.2d 211, 134 P.2d 321; *In re Estate of Russell*, supra, 43 Cal.App.2d 319, 110 P. 2d 718; *In re Estate of Haselbud*, supra, 26 Cal.App.2d 375, 79 P.2d 443), but the court cannot rewrite the testator's will. The devise to Ayres was effective to leave him a half interest in the property if the testator owned not less than a half interest at the time of his death which was subject to testamentary disposition, while the devise to appellant of the residue would leave him only so much of the testator's interest as was not devised to Ayres. Appellant under the will can claim only such excess. If the testator had parted with a half or smaller interest in the property before his death, appellant alone would have been the loser. Because of the marriage the will became inoperative as to the half interest in the real property which the wife inherited, yet it remained operative as to the half left to Ayres. The share of the latter was not reduced when the testator married and died without providing for his wife, because the basis for such a reduction would have to consist of provisions in the will placing Ayres and appellant upon an equality. But the devise to Ayres, being specific and unconditional, gives him a right which is superior to that of appellant, because the latter takes only the residue. It is true that the purpose of the testator to leave his son considerably more of the estate than he was leaving to his friend has been defeated, but it would have required an additional testamentary act to avoid that result, and this cannot be supplied by the courts under the guise of interpretation. The court can no more modify the plain provisions of the will than it can set it aside altogether because of the subsequent marriage. The will could be given an interpretation which would give appellant and Ayres one-fourth each of the real property in question only in the event that they had equal rights to share in the property under the will, which was not the case.

The next point urged is that the court erroneously charged against the residuary estate certain expenses incurred in the upkeep and sale of the residence property which should have been charged against the proceeds of the sale. There were deducted from such proceeds a real estate broker's commission, certain sums paid for control of termites, and escrow charges. There was then added to the balance \$233

received as rental for the property to the time of sale, and the balance was equally divided between the widow and Ayres.

[5] In connection with the sale of the property there were costs of publication and for certified copies amounting to \$8.95, and the administratrix and her attorney were each allowed \$75 as extraordinary compensation. The account showed sums paid for water bills and taxes on the property, for a water heater purchased, for roof repairs and for termite inspection, in the amount of \$79.41. All of these expenses were charged against the residuary estate. The contention is that these sums, totaling \$238.36, should have been charged against the share of appellant. It seems to us that the sum of \$79.41 should have been deducted from the gross rentals which went to the widow and Ayres; the several sums which made up this total were neither debts of decedent nor expenses of administration in the ordinary sense. Since the widow and Ayres received the income from the property during the period of administration, they should bear the expense of upkeep and improvements which made it possible for the estate to receive the income. However, appellant in his briefs does not contend that the widow's share should have been charged with any part of these items but only that Ayres should have borne his proportionate share of them, whatever that might be. We conclude, therefore, that one-half of the sum, or \$39.70, should be deducted from the share of Ayres and added to that of appellant.

In considering appellant's objection to the above-mentioned charges for extraordinary services of the administratrix and her attorney and minor expenses of the sale, we must determine what effect the trial court gave to a stipulation entered into by the three parties in interest, which reads in part as follows:

"That in consideration of the following agreement by Nellie V. Bendell as Administratrix-with-the-will-annexed and individually as the widow of said Charles C. Bendell, deceased, said Clarence Ayres consents that said property may be sold to Emerson Lucas for the sum of Three Thousand Dollars (\$3,000.00).

"That in consideration of the foregoing, Nellie V. Bendell individually and as Administratrix with-the-will-annexed of said Estate, agrees that the proceeds from the sale of the above property shall and will

be held by her separate and intact in a separate bank account except for real estate commission in the sum of One Hundred Fifty Dollars (\$150.00), escrow fees, and expense of termite extermination necessary in connection with the sale of said property, and that the interest of Clarence Ayres in and to said proceeds shall be the same as his interest in the real estate was prior to said sale, and said Nellie V. Bendell waives the right to obtain payment of any portion of her widow's allowance from the proceeds of said sale, and the proceeds of said sale shall not be subject to any of the debts of the decedent, attorney's fees, commission of administratrix, or expenses of administration, except insofar as the said real property at 3934 South Hobart Blvd. would have been subject to said expenses of administration, and that said fund shall only be distributed in accordance with the order of Court upon proper petition for distribution. \* \* \*

"By signature hereof Chandler & Wright [acting for appellant] approve the making of the sale above mentioned and agree that the net proceeds received from the sale shall have the same status with respect to being a source out of which payment of executor's and Attorneys' fees, family allowance and administration expenses should be made as the real property would have had, had the same not been sold. They do not agree that the claims of legatee, Clarence Ayres are sound but reserve the right to contest the same."

[6] The sale was thereafter made and the stipulation was before the court at the time of confirmation of the sale and at the time of distribution, as appears from the petition for distribution. (While the parties in their briefs have discussed the stipulation and a copy of it is appended to appellant's reply brief, it was not incorporated in the clerk's transcript. The original was ordered brought to this court and we have quoted therefrom as above.) The stipulation appears to us to be an agreement substantially to the effect that the proceeds

from the sale of the real property should be regarded as the property itself with respect to charges of any sort made against the same, excepting \$150 real estate commission, escrow charges and necessary expense of termite extermination, with which excepted items we are not concerned. The question then is whether the court erred in charging the other items against the residuary estate. The inquiry is further narrowed by the fact that appellant does not contend that any part of these sums should have been charged against the share of the widow. Presumably because no such claim is made against her, no brief has been filed on her behalf. This leaves the question whether any share of the compensation for extraordinary services and the minor expenses of sale should have been charged against the share of Ayres. On this point we find no reason for disturbing the order in so far as it charges the expenses against the residuary estate. The stipulation as between Ayres and appellant is ambiguous but we think it will bear the construction which the court apparently gave it, namely, that Ayres' share of the proceeds of the sale should be subject to no charges except such as might properly have been made against his interest in the real property if the same had not been sold. This construction, we think, would preclude the making of any charges against the proceeds incident to the sale, for had the sale not been made the liabilities would not have been incurred. Under these circumstances we should accept the interpretation which the trial court placed upon the instrument, and our duty so to do is more imperative because the appeal is upon the judgment roll.

The judgment is modified by deducting from the share of Clarence Ayres and adding to the share of appellant, William W. Bendell, as the same are contained in the decree of distribution, the sum of \$39.70, and as modified the judgment is affirmed.

PARKER WOOD, J., and SHAW, J.  
pro tem., concur.



**FARRELL et ux. v. PLACER COUNTY  
et al.\***

**No. 12425.**

District Court of Appeal, First District,  
Division 2, California.

June 11, 1943.

Hearing Granted Aug. 9, 1943.

**1. Bridges ☞23**

**Highways ☞203**

In action against two counties for injuries caused by defective condition of highway and bridge, complaint, not alleging that plaintiff's alleged oral statements to defendants' agent concerning accident within 90 days thereafter were verified or reduced to writing and filed, nor that verified claims for injuries were filed within such time, as required by statute, was insufficient to show "substantial compliance" with such requirement. Gen. Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Compliance with Statutory Requirement".

**2. Estoppel ☞107**

In action against two counties for injuries caused by defective condition of highway and bridge, complaint *held* not to allege sufficient facts to show "estoppel" of defendants by their agent's statements to plaintiff from denying that unverified oral claims made by plaintiff constituted valid claims, filed in manner and form required by law, or that verified claims were filed by plaintiff within time required by law. Gen. Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

**3. Estoppel ☞62(3, 4)**

The doctrine of "estoppel" may be invoked against county or municipal corporation only in rare cases.

**4. Counties ☞213**

**Municipal corporations ☞1021**

There can be no "waiver" or "estoppel" resulting from public officials' acts in dealing with persons required to file claims against counties and municipal corporations under claims statutes. Gen. Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

Appeal from Superior Court, Placer County; A. L. Pierovich, Judge.

Action by James P. Farrell and his wife, Lena Farrell, against the County of Placer and the County of Sutter for personal injuries sustained by plaintiff wife because of defective and dangerous condition of a highway and bridge situated partly in each county. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Morris, Jaffa & Sumski, of San Francisco, for appellants.

Lowell L. Sparks, Dist. Atty., of Auburn, Attorney for Respondent, County of Placer. Loyd E. Hewitt, Dist. Atty., of Yuba City, and Charles V. Barfield, of San Francisco (Thomas F. Sargent, of Auburn, and John J. Healy, Jr., of San Francisco, of counsel), for respondent Sutter County.

SPENCE, Justice.

Plaintiffs sued the two defendant counties seeking to recover damages resulting from personal injuries alleged to have been sustained by plaintiff Lena Farrell by reason of the defective and dangerous condition of a highway and bridge situated partly in each of the defendant counties. The complaint was in four counts. Defendants filed general and special demurrers. Said demurrers were sustained with leave to amend but plaintiffs declined to file an amended complaint. Defendants then moved for a dismissal which motion was granted and a judgment of dismissal was entered. Plaintiffs appeal from said judgment.

The trial court's opinion is included in the transcript and it shows that the trial court's ruling was based upon the failure of plaintiffs to allege the filing of verified claims against defendants within the time provided by law. It is conceded by all that the action was brought under the so-called public liability act, Stat.1923, p. 675; Deering's General Laws, Act 5619, and that the applicable provisions of law relating to the filing of claims thereunder read as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or de-

\* Subsequent opinion 145 P.2d 570.

fective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." § 1 of Stat. 1931, p. 3475; Deering's General Laws, Act 5149.

Plaintiffs further concede in their opening brief that "a formal verified claim in writing was not filed until after the expiration of the ninety days". Plaintiffs' complaint contained some allegations regarding the filing of claims but the uncertainty of said allegations was attacked by special demurrers. It now appears that plaintiffs rely upon alleged oral statements made by plaintiff Lena Farrell to an "agent" of the defendants within the ninety days; upon formal, verified claims filed after the expiration of the ninety days; and upon an estoppel based upon the alleged statements made by the "agent" of defendants to plaintiff Lena Farrell.

The complaint was filed on May 27, 1939. It alleged that injuries had been sustained on May 31, 1938, being almost one year prior to the filing of the complaint. With respect to the time of filing claims against the defendants it was merely alleged in the first count that verified claims against defendants had been "heretofore" filed.

The second count incorporated by reference all the allegations of the first count and it was then alleged in general terms that between May 31, 1938, and August 29, 1938, statements were made to plaintiffs by and on behalf of defendants, which statements were relied upon by plaintiffs and that defendants should therefore be "estopped to deny that the verified claims in writing filed with their respective boards of supervisors, as hereinabove alleged, were filed within the time provided by law therefor."

The third count incorporated by reference all the allegations of the first count except those relating to the filing of verified claims and then alleged in detail certain facts relied upon to create an estoppel. It was alleged on or about June 13, 1938, a per-

son who was the "agent" of the defendants, called upon plaintiff Lena Farrell, accompanied by a stenographer, during the time said plaintiff was a patient in the hospital as a result of her injuries; that plaintiff Lena Farrell "then and there made plaintiffs' claim against defendants and each of them for damages resulting from her injuries received as aforesaid, and said claim, including the place where the accident occurred, how it occurred, when it occurred and the nature of the injuries of said plaintiff Lena Farrell and all other matters required and requested by defendants was then and there reported in shorthand by said stenographer"; that the agent discussed a settlement with said plaintiff and advised her not to employ an attorney; that about ten days later, said agent again called at the hospital to discuss settlement but that said plaintiff stated that she desired to recover her health before specifying the amount of plaintiff's damages; that said agent then represented that it would be satisfactory to defendants for plaintiffs to do so; that said plaintiff remained in the hospital by reason of her injuries until the middle of September 1938; that plaintiffs believed and relied upon said representations and did not employ an attorney or take any steps or proceedings for several months; that defendants should be and are "estopped to deny that the said claim filed by plaintiffs on or about June 13, 1938, as aforesaid and recorded in shorthand by said stenographer, as aforesaid was filed in the form and manner provided by law."

The fourth count incorporated by reference all the allegations of the first count of the complaint and then realleged substantially all of the detailed allegations of the third count. It was then alleged that defendants should be and are "estopped to deny that said verified claims in writing filed with their respective boards of supervisors were filed within the time provided by law therefor".

The demurrers as to each count were both general and special, it being specified by way of special demurrer as to each count that it did not appear whether any verified claim had been filed as to either defendant within ninety days from the date of the accident as required by law.

We find no error in the action of the trial court in sustaining said demurrers and

in entering the judgment of dismissal upon plaintiffs' failure to amend. As we understand plaintiffs' contentions on this appeal they are (1) that plaintiffs alleged sufficient facts to show a "substantial compliance" with the law relating to the filing of claims and (2) that they alleged sufficient facts to show an estoppel on the part of defendants to deny either (a) that the so-called claims made on June 13, 1938, which were admittedly orally made and were not verified, constituted valid claims filed in the manner and form required by law or (b) that the verified claims "heretofore" filed, which were admittedly not filed within the ninety day period, were filed within the time provided by law.

[1] We find no merit in the contention that plaintiffs' complaint contained allegations sufficient to show a "substantial compliance" with the law relating to the filing of claims. As to the so-called claims made on June 13, 1938, it was not alleged that the alleged oral statements made by plaintiff Lena Farrell at that time to the alleged agent of defendants were "verified" or that they were reduced to writing or "presented in writing and filed". As to the alleged verified claims "heretofore" filed, it was not alleged that such claims were filed within the ninety day period. While the facts before the courts in the two cases cited by plaintiffs were held to constitute a substantial compliance (*Kelso v. Board of Education*, 42 Cal.App.2d 415, 109 P.2d 29; *Sandstoe v. Atchison, T. & S. F. Co.*, 28 Cal.App.2d 215, 82 P.2d 216) there are no comparable facts before us here. As was said in *Hall v. City of Los Angeles*, 19 Cal.2d 198, at page 202, 120 P.2d 13, at page 15, "Substantial compliance cannot be predicated upon no compliance" and it has been held that there can be no substantial compliance unless a written, verified claim is filed within the time prescribed. *Spencer v. City of Calipatria*, 9 Cal.App.2d 267, 49 P.2d 320; *Johnson v. City of Glendale*, 12 Cal.App.2d 389, 55 P.2d 580.

[2-4] Nor do we find any merit in the contention that plaintiffs alleged sufficient facts to show an estoppel on the part of defendants. It is only in rare cases that the doctrine of estoppel may be invoked against a county or municipal corporation (*First Trust & Sav. Bank v. City of Pasadena*, 21 Cal.2d 220, 130 P.2d 702; 10 Cal.Jur. 651) and it has been consistently held in

this state that there can be no waiver or estoppel resulting from the acts of public officials in dealing with persons required to file claims against counties and municipal corporations under such claims statutes. *Hall v. City of Los Angeles*, 19 Cal.2d 198, 120 P.2d 13; *Kline v. San Francisco U. School District*, 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; *Cooper v. County of Butte*, 17 Cal.App.2d 43, 61 P.2d 516; *Johnson v. City of Glendale*, 12 Cal.App.2d 389, 55 P.2d 580.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., pro tem., concur.



58 Cal.App.2d 771

**WEST COAST LIFE INS. CO. v.  
CRAWFORD et al.**  
Civ. 13789.

District Court of Appeal, Second District,  
Division 3, California.  
May 25, 1943.

Rehearing Denied June 22, 1943.

Hearing Denied July 22, 1943.

#### 1. Insurance ⇨260

The concealment by beneficiary who obtained life and accident policies on his children of intent to murder children is "fraud" warranting rescission of policies.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

#### 2. Insurance ⇨448

Beneficiary forfeited all right to proceeds of life policies when he murdered his insured children.

#### 3. Trial ⇨142

Whether a particular inference can be drawn from certain evidence is a "question of law", but whether inference should be drawn in any given case is a "question of fact" for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".



**4. Appeal and error** ⇨1056(1)

In action to cancel life and accident policies for beneficiary's concealment of intent to murder his insured children when he applied for policies, refusal to admit exhibit from which inference could have been drawn sustaining insurer's contention was reversible error notwithstanding possibility that trial judge would not have drawn such inference.

**5. Appeal and error** ⇨1056(1)

**Insurance** ⇨659(1)

In action to cancel life and accident policies on beneficiary's children whom he murdered, refusal to admit exhibit written by beneficiary before policies were issued containing figures by which he ascertained what he would receive if his wife and children were accidentally killed from which his intent to murder existing at time of application for policies could be inferred was reversible error.

**6. Evidence** ⇨54

Rule that an inference may not be based upon an inference applies only where second inference does not follow logically from fact established by first inference.

**7. Evidence** ⇨54

Inferences may be based on facts whose determination is result of other inferences, so long as first inference is based on such evidence as to be regarded as a proved fact and conclusion reached is not too remote.

**8. Trial** ⇨142, 382

Mere fact that conflicting inferences may be drawn from evidence does not establish that there is nothing for jury, or trial court sitting without jury, but mere guesses and conjectures.

**9. Evidence** ⇨222(1), 252, 314(1)

In action against beneficiary to cancel life and accident policies on beneficiary's children whom he murdered, testimony of deputy district attorney as to what beneficiary said was "direct evidence" of statement but "hearsay" as to facts therein contained, and was admissible against beneficiary and his assignees as an "admission" but incompetent as against administrator of children's estates who was seeking to recover on policies.

See Words and Phrases, Permanent Edition, for all other definitions of

"Admission", "Direct Evidence" and "Hearsay".

**10. Trial** ⇨105(1)

Incompetent evidence received without objection is sufficient to support a finding.

**11. Evidence** ⇨211, 252

In action against beneficiary to cancel life and accident policies on beneficiary's children whom he murdered, beneficiary's statements as a witness in murder trial were receivable as "admissions against interest" but inadmissible against administrator of children's estates who was seeking to recover on policies. Code Civ. Proc. §§ 1848, 1853, 1870, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission Against Interest".

**12. Evidence** ⇨252

In action to cancel life and accident policies on beneficiary's children whom he murdered, statements made by beneficiary as agent of children in procuring policies were competent as against administrator of children's estates who was attempting to recover on policies but not a statement made after death of children or after issuance of policies. Code Civ. Proc. §§ 1848, 1853, 1870.

**13. Evidence** ⇨243(2)

In action to cancel life and accident policies on beneficiary's children whom he murdered, beneficiary's letter containing statement relating to conversation about putting \$40,000 into life annuity policy at time of taking out policies on children was incompetent as against administrator of children's estates who was attempting to recover on policies.

**14. Insurance** ⇨448

Public policy against payment of proceeds of insurance to murderer of insured does not relieve insurer of obligation, so that if result of allowing recovery is not to enrich murderer, recovery is proper.

**15. Insurance** ⇨448

Under Probate Code, section 258, preventing murderer of decedent from succeeding to estate, fact that beneficiary of life and accident policies on his children murdered children did not relieve insurer of obligation under policies, since even if beneficiary were only heir proceeds would be payable to state under section 1027. Probate Code, §§ 258, 1027.

**16. Insurance** ⇨665(7)

In administrator's action to recover under accident policies, evidence did not sustain finding that policy provision that affirmative proofs of loss must be furnished within 90 days after date of loss was complied with.

On Motion for Rehearing.

**17. Appeal and error** ⇨832(6)

Where correction of record requested by respondent after reversal would not be of benefit to respondent, motion for rehearing for purpose of supplementing record was denied.

**18. Appeal and error** ⇨837(11)

In considering sufficiency of evidence to support a finding, full weight must be given to evidence which would have been excluded if objected to and even to evidence erroneously admitted over objection, provided it be relevant.

**19. Appeal and error** ⇨832(6)

Where decision of District Court of Appeal would be the same whether evidence relied upon to sustain decision was admitted without objection or over objection, motion, on rehearing, to supplement record to show that such evidence was in fact admitted over objection was denied.

**20. Evidence** ⇨587

To establish a theory by circumstantial evidence, it is not necessary that facts be such and so related to each other that such theory is only conclusion that can fairly or reasonably be drawn therefrom.

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Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Three actions by West Coast Life Insurance Company against Laurel Harvey Crawford and others to rescind five life and accident insurance policies on named defendant's three minor children which policies were obtained on application of named defendant, wherein Milton M. Cohen, Jr., administrator of the estates of Helen Jeannette, Paul, and Alice Crawford, deceased, cross-complained to recover on the policies. From a judgment for cross-complainant, plaintiff appeals.

Reversed.

Keesling, Smith & Wayland and De Lancey C. Smith, all of San Francisco, for appellants.

Alfred F. MacDonald, Milton M. Cohen, and Jerome H. Kann, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff in these three consolidated cases appeals from a judgment providing not only that it take nothing by virtue of its endeavor to rescind five life and accident insurance policies, but that, in its role as cross-defendant, it should pay the sums set forth in the policies it had sought to have cancelled. We have reached the conclusion that the judgment should be reversed because of the rejection of an exhibit important to the proof of plaintiff's cases and to its defense against the cross-actions brought upon the policies.

[1] In each of the three consolidated actions resulting in the judgment appealed from it was alleged and found to be true that Laurel Harvey Crawford had applied for, and the plaintiff had issued, life insurance policies on Crawford's three minor children, and accidental death policies on the two of the three who were old enough to be the subjects of such policies. In each of these policies Crawford was named as beneficiary. Some seven months after receiving the last of these policies Crawford murdered his three children. Plaintiff's position was that there had been on Crawford's part a fraudulent concealment of a material fact, that fact being Crawford's intention, in existence at least by the time the policies were issued, himself to take the lives of his children. The trial court found that no such intention existed, and as a necessary consequence decreed that the plaintiff take nothing. No one is questioning plaintiff's position that if Crawford had the intention to murder his children, his concealment of that intention, up to the time that the policies were issued, was fraud warranting a rescission of the policies. *Pierre v. Metropolitan Life Insurance Co.*, 1937, 22 Cal.App.2d 346, 350, 70 P.2d 985, 987.

[2] In each of the policies Crawford was named as beneficiary, his wife to be the beneficiary if he should fail or not survive. Crawford forfeited all his rights as a beneficiary when he murdered the insured, so that neither he nor the defendants who claim through him have any right to the proceeds of the policies. *Meyer v. Johnson*, 1931, 115 Cal.App. 646, 647, 2 P.2d 456. At the same time that he took the life of his children Crawford murdered his wife, who

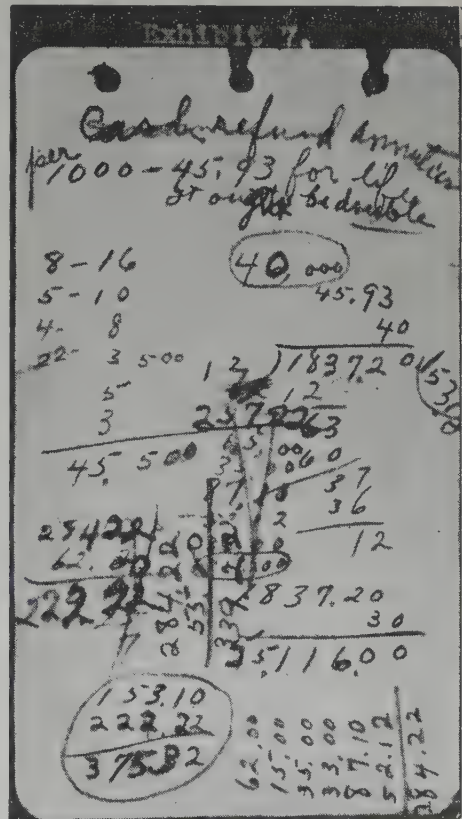
was also insured. This left no designated beneficiary, with the result that Milton M. Cohen, Jr., who had been appointed administrator of the several estates of the children, by way of cross-actions presents the claims of the estates for the proceeds of the policies. The plaintiff, as cross-defendant in the three actions, defends on the same ground of fraudulent concealment as that upon which it bases its three actions. It also interposed special defenses which we shall consider in due course. Crawford's murder trial, to which we shall have occasion to refer, resulted in a judgment of conviction, affirmed on appeal in *People v. Crawford*, 1940, 41 Cal.App.2d 198, 106 P.2d 219. The details of the murder, engineered to make it appear that an automobile accident had occurred, are not contained in the incomplete record of the evidence before us and we are not assuming that they were proved in this case.

Plaintiff's attack upon that part of the judgment decreeing that it take nothing is made, not upon the ground that the evidence received does not support the finding upon which the judgment was based, but upon the ground that the trial court erred in refusing to admit in evidence, and then in rejecting an offer of proof respecting, a piece of paper which would have supported a finding in plaintiff's favor. We shall call this piece of paper exhibit 7 although it was not received in evidence but only so marked for identification.

[3, 4] Looked at in the light of the evidence which was before the court when exhibit 7 was rejected, this exhibit might have been seen to cast a most sinister shadow across all five of the policies issued to Crawford on the lives of his children. In making this statement we are not substituting our viewpoint of the facts and the inferences which should be drawn therefrom for that of the trial judge. It is true that "whether [an] inference shall be drawn, in any given case, is a question of fact"; but it is also true that "Whether a particular inference can be drawn from certain evidence is a question of law," both quotations being taken from *Blank v. Coffin*, 1942, 20 Cal.2d 457, 461, 126 P.2d 868, 870. All that we are stating is that as a matter of law inferences favorable to the plaintiff could have been drawn from exhibit 7 had it been received in evidence. The possibility that the trial judge would not have drawn such inferences does not retrieve from error the ruling

rejecting the exhibit. *Mashbir v. Mashbir*, 1938, 29 Cal.App.2d 733, 85 P.2d 482. Obviously, a refusal to permit a party to testify concerning a disputed fact could not be defended on the ground that had he testified the trial judge could have disbelieved him because he was partisan, and so not worthy of belief. Exhibit 7, as we shall see, was full of meaning to one who would read between the lines. Its rejection cannot be justified because the trial court would not have been obliged to read between the lines.

[5] To one not familiar with the admissions of the pleadings and with the evidence which had been received, this exhibit would have little meaning. But the trial



judge, who was sitting without a jury, was in a more favorable situation. He knew that by the pleadings of all parties it was agreed that in December of 1939 Crawford had wilfully murdered his wife and their three children. He knew that by the pleadings the main issue of fact before him was this: when did the intent to murder find lodgement in Crawford's mind? The trial judge could, we can almost say must,



have noted at once the strange coincidence respecting the two columns of figures appearing at the left of the exhibit. This exhibit, it should be noted, had been written entirely by Crawford. Crawford, no longer a resident of Los Angeles County, was not a witness at the trial of these cases, but Deputy District Attorney Barnes was, and he was permitted without objection to relate some of the statements Crawford had made as a witness when he was on trial for his life. A trier of fact could conclude that embarrassing statements made by Crawford as a witness on trial for murder would not have been made unless their very truth required their utterance. So, the trial court must have believed, Crawford wrote exhibit 7, because he had testified that he wrote it. Mr. Clark Sellers, the nationally recognized handwriting expert, later on testified that it was his very definite conclusion that Crawford wrote all the words and figures on the exhibit. The bottom figure "3" of the column which was totaled up to 45,500, represented, so Crawford stated, some automobile insurance. The figure "5", just above it, referred to a \$5,000 accident policy which he then had on his wife.

What of the other figures in the two columns? By a strange coincidence these too are the same as the amounts of insurance for which he had made application. A Mr. Primeaux had testified that in response to Crawford's written request to the plaintiff he, the agency manager of plaintiff's Pasadena branch office, had called upon Crawford early in September, 1938. Crawford had been shopping around for the lowest rates, he told Primeaux, and found plaintiff's to be the best. Four applications for insurance were signed by Crawford on September 14. One was for a life policy on his seven year old daughter Helen. (This policy, in the amount of \$3,500 is the policy involved in the action with the superior court number 456,584.) The second application resulted in the issuance of a life policy in the sum of \$4,000 upon nine year old Paul. Because Paul was under ten years of age at the time (September, 1938), an accidental death policy could not be issued. This was explained to Crawford, who responded that he would apply for the double indemnity when the boy reached ten. This he did, and under date of May 10, 1939, an "Accidental Death or Dismemberment" Policy, increasing the value of his son's death to him to eight thousand dollars, was received by Crawford

from the plaintiff. (These two policies are the subject matter of the action bearing the superior court number 456,585.) Upon his fourteen year old daughter Alice, Crawford obtained double insurance: \$5,000 on her life and an additional \$5,000 should her death be accidental. (These policies are the subject matter of plaintiff's third suit, bearing superior court number 456,586.) The fourth application that Crawford signed was for an \$8,000 policy on his wife's life, doubling to \$16,000 in case of accidental death.

What other conclusion does common sense permit than this? Crawford, having obtained some insurance, having applied for more, and planning to apply for still another policy, all of which would become payable to him should an automobile accident snuff out the lives of his wife and three children, employed exhibit 7 to figure out what sum the several policies would bring him, and the answer was \$45,500. If it be said that other conclusions are possible, it remains true that the conclusion we have expressed is certainly one that could logically have been made.

We find other computations on the exhibit. Under the words "cash refund annuities per 1000—45.93 for life," written by Crawford, we find the figure "40,000" encircled, and then the figures "45.93" multiplied by 40. The "45.93" must have rung a bell in the trial court's memory. This was the figure given to Crawford by Primeaux, in response to the latter's request for information concerning what he would receive as an annuity each year for life for each \$1,000 he paid the plaintiff. If he took \$40,000 of the \$45,500 insurance he would collect if all his dear ones should die in an automobile accident and invested it in annuity contracts, what would his yearly take be? \$1,837.20, according to the calculations Crawford made on exhibit 7. How much would this amount to each month? Divide \$1,837.20 by 12, as Crawford did, and you have the answer: \$153.10.

Along the lower edge of the exhibit we find that Crawford had made another computation; this time, according to his statements, he had figured up what his present income was. The top figure, 62.00, was his wife's earnings; then three rents, then government compensation and lastly, government insurance, a total expressed in dollars and cents, of \$284.22. Before adding his then income, inferentially figured

on a monthly basis, to the monthly income which he would receive if all his insurance investments were harvested and reinvested in annuities, a subtraction is necessary; his wife's earnings must be deducted, for you cannot eat your cake and have it too. So we find Crawford's figures: 284.22 minus 62.00, leaves 222.22. Now to that amount may be added the anticipated annuities, reduced to a monthly basis, and you have the total: \$375.32.

The picture is not complete without some other bits of evidence. Crawford, at the time Primeaux first called on him, casually said "he had some funds that probably he would invest into an annuity later on." The business at hand, on that occasion, however, had to do with a discussion of rates, leading to the making of the applications for the policies on his wife and three children, on September 14, 1938. Ten days or two weeks later Crawford came to Primeaux's office and inquired about single premium annuities. It was at this interview that he obtained the figure "45.93" which he used in his computations, on exhibit 7, and at this interview "he mentioned \* \* \* that he possibly might come into a large sum of money and might invest into this annuity." The fact was, according to Crawford's testimony at the murder trial, that he had no \$40,000 to invest in annuities, but that he did figure the possible returns on this basis.

All the policies applied for on September 14 were issued on October 11, except that the policy of \$8,000-\$16,000 covering his wife's life was issued for \$8,000 only; it did not double in case of accidental death. Crawford did not like the rejection of his application for double indemnity on his wife, according to Primeaux, and on November 22, 1938, requested the company to cancel the policy, which was done. It was before November 22 that he did the figuring on exhibit 7, according to his reported testimony (an earlier date was of no importance at the murder trial). On the exhibit, however, the figures "8-16" top the list, and without the "16" the total would fall below 40,000. The conclusion would be justified, therefore, that when Crawford made the computations on exhibit 7 he did not know that the eight doubling to sixteen thousand dollar policy had been issued only for eight thousand dollars, so that the sixteen thousand was not to be counted on. In other words, the exhibit,

as we have noted its figures and notations, was written before the policies were issued.

It is true, there is other evidence, which we have not reviewed, which might cast doubt upon some of that which we have mentioned, and there are some figures on the exhibit that remain unexplained and some which may have been added even after November 22. But, we reiterate, our thesis has not been that if exhibit 7 had been introduced the finding would have been required that Crawford had defrauded the plaintiff. We do insist, however, that a person of ordinary common sense, with the exhibit and the evidence before him, could with reason say: It appears clear to me that before Crawford received the policies on the lives of his children, months before applying for and receiving the additional dismemberment policy on his son Paul, he intended to cash in on those policies by doing that which he ultimately accomplished; that is, he intended himself to cause their deaths.

[6] Occasionally a conflict appears to exist between a rule of law and the dictates of common sense. Such conflicts are at times inescapable, but more often justify a careful reexamination of the rule of law; it may be either unsound or other than it seems to be. We have discussed somewhat fully the matters involved in and surrounding the rejected exhibit because of the possibility that in them is enmeshed such a conflict, a conflict between the rule governing in everyday affairs and that which is sometimes offered as a rule of evidence, the rule that "an inference may not be based upon an inference." We have reached the conclusion that there is no such rule in this state save where the second inference does not follow logically from the fact established by the first inference.

An interpretation of the rule that would result in its forbidding the use of exhibit 7 in a chain of reasoning, would make it conflict with the rule of daily experience. Let us suppose a man is found dead, with a cut in his heart an inch wide. At his side is a bloody knife with a blade an inch wide, and blood stained handle bearing fingerprints. An acquaintance of the slain man is found to have fingerprints matching those on the handle. This acquaintance was reported to have said a week before the incident: "I warned him not to cross my path again." A group of ordinary citizens would conclude, in the ab-

sence of any satisfactory explanation, that the man had been deliberately slain by his acquaintance, arriving at this conclusion by adding inference to inference to inference. Would a group of judges be compelled to resolve that the evidence was legally insufficient to enable them to affirm a conviction of murder in the first degree? Of course not. See *People v. Reed*, 1941, 17 Cal.2d 405, 110 P.2d 394, and *People v. Walsh*, 1942, 50 Cal.App.2d 164, 122 P.2d 671. The explanation may be made that the rule does not ban a course of reasoning which adds inference to inference, so long as any inference is not based upon a prior inference. What then of our supposititious case, and of *People v. McQuate*, 1934, 2 Cal.2d 327, 39 P.2d 408 and *People v. Greig*, 1939, 14 Cal.2d 548, 95 P.2d 936, where the facts of intent were inferred from facts established by inferences? Section 1832, Code of Civil Procedure, illustrates its definition of indirect evidence with this statement: "For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred." In the *McQuate* case a fact that was proved by direct evidence was defendant's statement that he had attempted to dig a grave two days before the killing took place. From the defendant's making of this statement it was inferred that he did his work on the grave on Wednesday. From the fact thus legally proved, it was inferred that on Wednesday he had an intent to kill his victim. Still a further inference is involved (is it not?) that on Friday, when the killing took place, it was deliberate, because the intent of Wednesday still persisted.

In only two cases in this state, so far as we are aware, has there been any discussion of the so-called rule. The first of these is the case of *People v. Graves*, 1934, 137 Cal.App. 1, 29 P.2d 807, 813, 30 P.2d 508, where the conviction of the defendant on a charge of bribery was upheld, although the evidence was entirely circumstantial. The court said (page 14 of 137 Cal.App., page 813 of 29 P.2d): "Courts have sometimes used the expression that an inference cannot be based upon an inference and appellant has sought to apply this principle as a reason for rejecting the evidence under consideration. In the first place, the expression itself is far from an accurate one. Just as the language we speak is said to be made up of dead metaphors, so our ordinary statements

as to facts are really made up of dead inferences. These inferences are so intimately associated with known or obvious facts that we habitually accept them as facts. Wigmore, at section 41, volume 1, of his treatise on Evidence says flatly, 'There is no such rule, nor can be.' But using the term as loosely as you please, how does it apply to the situation here? The fact is the large amount of currency was withdrawn from the bank. We know by inference from other facts that on the same day appellant had a large sum of currency in hand. We know from other facts and inferences all of the other circumstances. It is from the reasonable relation of all of these separate relevant facts each to the other that an inference of the greater fact, to wit, the corrupt agreement and its consummation, is drawn."

The second case in California, coming to our attention, which discusses the epigram that one inference may not be based on another is *Paiva v. California Door Co.*, 1925, 75 Cal.App. 323, 330, 242 P. 887, 890. This quotation sets forth the problem before the court, and the court's comments upon it: "From the extent to which this stump had been burned, it is evident that it must have commenced to burn at a time prior to September 18th. Since no fires were kindled on defendant's premises on the 17th, it logically follows that it must have been burning on the morning of that day and prior thereto. Taking it then as a justifiable inference that the stump was burning on Monday morning, and giving consideration to the further proved fact that a strong wind was blowing past the stump in the general direction of the place where the fire started, it would not be unreasonable, in the absence of other explanation, to infer that the fire was caused by sparks from the burning stump. [Citing cases.]

"Respondent contends that the foregoing reasoning is faulty, in that 'an inference cannot be based on another inference.' The second inference is not based upon the first inference alone, but upon the inferred fact that the stump was burning, and the further fact, proved by direct evidence, that a strong wind was blowing from the stump towards the origin of the fire. The statement that an inference cannot be based upon another inference appears itself to be based upon an unsubstantial foundation. 'An inference is a deduction



which the reason of the jury makes from the facts proved, without an express direction of law to that effect.' Code Civ.Proc., § 1958. 'An inference must be founded on a fact legally proved.' Code Civ.Proc., sec. 1960. Facts established by circumstantial evidence are 'proved' and 'legally proved,' and the foregoing sections do not provide that the facts upon which an inference may be founded must be proved by direct evidence. To hold that an inference cannot be based upon facts inferred from testimonial evidence would be to confine circumstantial evidence within narrow limits. In Wigmore on Evidence, § 41, it is said: 'It was once suggested that an "inference upon an inference" will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence; and this suggestion has been repeated by a few courts, and sometimes actually enforced. There is no such rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. \* \* \* In \* \* \* innumerable daily instances we build up inference upon inference, and yet no court ever thought of forbidding it. \* \* \* The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon.'"

[7] Hearings in the Graves case and in the Paiva case were denied by the Supreme Court, and in no subsequent case has an expression of doubt about the soundness of the conclusion there reached been voiced. We do have, however, some cases in this state where the rule there criticized is apparently used as the yard stick by which a chain of reasoning is measured and found wanting. We do not consider ourselves bound by the reference to the "rule" in these cases, however, because in none of them was there a sound chain of reasoning. For example, in the only Supreme Court case which mentions the rule, *Hamilton v. Pacific Elec. Ry. Co.*, 1939, 12 Cal.2d 598, 601, 86 P.2d 829, 830, it appears in this setting: "Indeed, considering the fact that at 8:30 o'clock p. m., many persons were making use of the waiting room, it is not improbable that during the time that plaintiff was an occupant thereof, several persons either did enter or leave it,—in which event it would have been possible that at any given moment of such time any

one of them might have caused the oil to be deposited upon the floor of the waiting room. However, in order to arrive at the indicated conclusion it would be necessary that one inference be made to depend upon a precedent inference; and, as has been repeatedly ruled, such a course of reasoning is not permitted in the law." No case was cited in support of this declaration, but these might have been, where reasoning as tenuous as that just noted was condemned. *Tucker v. City of San Francisco*, 1931, 111 Cal.App. 720, 726, 296 P. 101; *Jenkins v. National Paint & Varnish Co.*, 1936, 17 Cal.App.2d 161, 169, 61 P.2d 780; *People v. Kazatsky*, 1936, 18 Cal.App.2d 105, 110, 63 P.2d 299. See, also, *Robbiano v. Bovet*, 1933, 218 Cal. 589, 597, 599, 24 P.2d 466. We are of the opinion that in this state this quotation from 31 C.J.S., Evidence, § 116, p. 728, aptly describes the status of the rule we have been discussing: "\* \* \* it has been broadly asserted in many decisions that inferences cannot be founded on inferences. This rule has been said to be not a rule of general application but a rule of reason governing only when the proved facts and their reasonable implications furnish no basis for agreement or disagreement by persons of average intelligence as to whether the factum probandum has been established; but there is in fact no rule of law that forbids the resting of one inference on facts whose determination is the result of other inferences. On the contrary, inferences may be based on facts whose determination is the result of other inferences, so long as the first inference is based on such evidence as to be regarded as a proved fact and the conclusion reached is not too remote."

[8] We conclude, therefore, that upon the entire evidence the finding would have been justified, had exhibit 7 been before the trial court, that Crawford entertained the intention of killing his children before the policies were issued, for our decisions illustrate rather than deny the soundness of basing an inference on a fact established by a reasonable inference. Nevertheless it is possible that on a retrial the finding will be made that he did not at that time have such an intention. Respondent, relying upon a statement in *Re Estate of Moore*, 1923, 65 Cal.App. 29, 33, 223 P. 73, 75, argues that if conflicting inferences may be drawn from the evidence, "then there is nothing for the jury, or the trial

court sitting without a jury, but mere guesses and conjectures." This, of course, is not the law. *Medico-Dental Bldg. Co. v. Horton & Converse*, Cal.Sup., 1942, 132 P. 2d 457, 471, and cases cited.

[9-12] The possibility of a finding adverse to plaintiff, on a new trial, warrants us in considering some further points presented upon this appeal. Part of the evidence touching upon exhibit 7, and furnishing the basis for our recital of the facts, was incompetent, and had a proper and timely objection been made it would doubtless have been excluded. We have in mind the testimony by deputy district attorney Barnes as to what Crawford said had been done by him. This was, of course, direct evidence that Crawford had so stated, but of the facts which were contained in Crawford's statements the testimony was hearsay. Insofar as it constituted admissions against Crawford's interest it was admissible, as we are about to see, against Crawford and the defendants who claimed by assignment from him, but not against the administrator. However, no objection was made, and it is established that evidence, though incompetent, received without objection is sufficient to support a finding. *Powers v. Board of Public Works*, 1932, 216 Cal. 546, 552, 15 P.2d 156, *Nelson v. Fernando Nelson & Sons*, 1936, 5 Cal. 2d 511, 518, 55 P.2d 859, so we did not hesitate to use it in our recital of the facts. An offer of proof was made, after exhibit 7 was rejected, consisting in large measure of further statements made by Crawford when a witness. To this offer, however, objection was made and sustained. As to Crawford himself and the defendants claiming under him, his statements as a witness in the criminal trial might well have been received as admissions against his interest, Sections 1853, 1870, subd. 2, Code of Civil Procedure; *Griffin v. Jacobsen*, 1936, 17 Cal.App.2d 68, 70, 61 P.2d 350, 351, but of the effect of the ruling in this regard plaintiff has voiced no complaint, doubtless because it recognizes that in reality it is not hurt by it. Crawford's statements, however, were inadmissible against the respondent. *Griffin v. Jacobsen*, supra. "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them \* \* \*." § 1848, Code Civ.Proc. No "particular relation" existed between Crawford and the respondent administrator at the time

Crawford made the statements that plaintiff offered to prove. Any interest the administrator has in the proceeds of the life or accident insurance policies comes, not as a successor of Crawford's right as a beneficiary, for by his own hand Crawford had destroyed himself as a beneficiary, with the result that there was none. The administrator represents the insured children and doubtless Crawford was their agent in securing their insurance so that his fraud, if established, would defeat their claims based on the policies, and statements he made in procuring the policies would be competent evidence. But the statements sought to be introduced were not made in his activity as agent; they were made long after the agency had ceased to exist both because of the lack of live principals and because the duties of the agent had been completely discharged. In the premises the admissions of the agent were inadmissible against the principal. *Taylor v. Bernheim*, 1922, 58 Cal.App. 404, 409, 410, 209 P. 55, 58; 31 C.J.S., Evidence, § 347, p. 1121. The administrator cannot be said to be the representative of Crawford, as was found to be true in *McDonald v. Mutual Life Ins. Co.*, 1916, 178 Iowa 863, 160 N.W. 289, as we shall note later.

[13] The plaintiff also complains of an adverse ruling on its offer of a letter written by Crawford to it, under date of November 30, 1938, containing this statement: "Mr. Primeaux will tell you that at the time I applied for these policies I also talked with him about putting \$40,000.00 into one of your life Annuity policies." This letter would have warranted the drawing of an inference, against Crawford and his assignees only, that at the time he applied for the policies he talked about the annuity, but it is not competent evidence of anything against the respondent administrator, who objected to its introduction. Nor was it error to refuse to admit in evidence a \$2,000 to \$4,000 policy which Mr. Primeaux testified had been issued upon the life of Crawford's wife in the fall of 1939.

[14, 15] The plaintiff, now to be referred to as the cross-defendant, makes the contention, applicable alike to the life and the accidental death policies, that "There is no evidence in the case that there is anybody entitled to take the benefits of the policies involved except the murderer beneficiary who is barred from taking," citing these

cases: *McDonald v. Mutual Life Ins. Co.*, supra, 178 Iowa 863, 160 N.W. 289; *Johnston v. Met. Life Ins. Co.*, 1919, 85 W.Va. 70, 100 S.E. 865, 7 A.L.R. 823, and *Wickline v. Phoenix Mutual Life Ins. Co.*, 1928, 106 W.Va. 424, 145 S.E. 743. These authorities would support cross-defendant's contention were it not for the fact that in this state it is wrong to assume that the beneficiary is an "anybody entitled to take the benefits of the policies." The two cases last cited dealt with a situation where, by the statutes controlling, had the representative of the insured's estate been permitted to recover on the policies, the probate court would have had no option but to distribute the proceeds to the murderer. To make effective the public policy that denies to a murderer fruit from his crime, the denial of recovery on the policies was found necessary. (The *McDonald* case dealt with the admissibility of evidence.) These cases, however, point out that public policy does not relieve the insurer of its obligation, so that if the result of allowing recovery is not to enrich the murderer, recovery is proper. This is the law of this state (*Meyer v. Johnson*, supra, 115 Cal.App. 646, 2 P.2d 456), and the rule generally. 70 A.L.R. 1543. In this state, contrary to the statute expressly relied upon in the *Wickline* case, *Crawford* cannot receive from the estates of his children the insurance recovered in these actions, for section 258 of the Probate Code provides: "No person convicted of the murder of the decedent shall be entitled to succeed to any portion of the estate; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of this chapter." Should it develop in the probate proceedings that there are no "other persons entitled thereto," the result would not be to authorize a distribution to *Crawford*; section 1027 of the Probate Code would then come into operation and the proceeds would go to the state. The problem of the distribution of the assets of the estates is one for the probate court, it was not involved in these actions.

[16] By way of defenses to the cross-actions on the two accident policies the cross-defendant alleged that the provisions of the policies, that affirmative proofs of loss had to be furnished within ninety days after the date of loss, were

not complied with. The trial court found these allegations to be not true. This finding is not only not supported by but it is contrary to the evidence; the date of loss was December 11, 1939; the cross-complainant was appointed administrator in each estate June 25, 1940; proof of loss was not submitted to the company until January 13, 1941. The trial court did find that the cross-defendant denied all liability upon the insurance policies, but there was no finding of facts respecting the time and occasion of the making of this denial to justify the conclusion of law that "by reason of its denial" the cross-defendant "waived all requirements to be done or performed as a condition precedent. \* \* \*

The judgments appealed from are reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

On Motion for Rehearing.

PER CURIAM.

[17-19] At one point in our opinion we made the statement that "it is established that evidence, though incompetent, received without objection is sufficient to support a finding", having already noted that to the admission of the evidence which we were discussing, no objection had been made. In his petition for a rehearing respondent represents that he in fact did make objections but that they were omitted from the bill of exceptions, although he sought to have them included. If it would avail respondent aught we would grant a rehearing in order that such steps as might be found proper be taken to supplement the record now before us so that the objections he made during the trial would be included. However, the correction of the record requested would not be of benefit to the respondent, for "Where, as here, the insufficiency of the evidence is the question to be determined, full weight must be given to evidence which would have been excluded had objection been made, and even to evidence erroneously admitted against objection provided it be relevant. Evidence may tend to prove the issues and yet be incompetent." *Holzer v. Read*, 1932, 216 Cal. 119, 123, 13 P.2d 697, 698. To the same effect: *Wright v. Roseberry*, 1889, 81 Cal.



87, 91, 22 P. 336; Archibald Estate v. Matteson, 1907, 5 Cal.App. 441, 446, 90 P. 723; Globe Grain & Milling Co. v. Drenth, 1919, 41 Cal.App. 604, 606, 183 P. 285; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 1937, 23 Cal.App.2d 642, 644, 73 P.2d 1241. See, also, Mitchell Camera Corp. v. Fox Film Corp., 1937, 8 Cal.2d 192, 197, 64 P.2d 946; Syar v. United States Fidelity & Guar. Co., 1942, 51 Cal.App.2d 527, 528, 125 P.2d 102. Our decision would be no different, therefore, if the record were to be completed by adding respondent's objections.

[20] In his petition for a rehearing respondent agrees with us that an inference may be based on an inference, but argues that this is only so when the inference is the only one that can logically be drawn, quoting in support of his argument these words (and others), from Estate of Wallace, 1923, 64 Cal.App. 107, 110, 111, 220 P. 682, 683: "An inference cannot be said to be established by circumstantial evidence, either in a civil or a criminal case, unless the circumstances relied upon are of such a nature and so related to each other that it is the only inference which can fairly or reasonably be drawn from them. If other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it." The Supreme Court denied a hearing in the Wallace case, but in doing so disapproved of the statement we have quoted, a fact to which attention was called in Robertson v. Weingart, 1928, 91 Cal.App. 715, 723, 267 P. 741, in Strock v. Pickwick Stages System, 1930, 107 Cal.App. 298, 301, 290 P. 482, and in Lejeune v. General Petroleum Corp., 1932, 128 Cal.App. 404, 416, 18 P.2d 429. From Katenkamp v. Union Realty Co., 1940, 36 Cal.App.2d 602, 617, 98 P.2d 239, 246, we quote these words (the emphasis is the court's): "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom \* \* \*." Among the authorities cited is "opinion of Supreme Court denying a hearing in Estate of Wallace \* \* \*."

The petition to augment the record on appeal is denied; the petition for a rehearing is denied.

Hearing denied; SHENK and CURTIS, JJ., dissenting.

\* Subsequent opinion 148 P.2d 649.

**ROSS et al. v. CITY OF LONG BEACH.\***  
Civ. 14112.

District Court of Appeal, Second District,  
Division 2, California.

June 10, 1943.

Rehearing Denied July 1, 1943.

Hearing Granted Aug. 5, 1943.

**1. Appeal and error ⇨544(2)**

When an appeal is taken on the judgment roll alone, the appellate court is confined in its review to the facts appearing upon the face of the record.

**2. Taxation ⇨242(2)**

When property is used exclusively for public school purposes, it is exempt from taxation from the very moment such use commences, regardless of who may hold the legal title to the property. Const. art. 13, § 1.

**3. Appeal and error ⇨544(2)**

On appeal on the judgment roll alone, District Court of Appeal was confined in its review to the facts appearing in the record.

**4. Taxation ⇨242(2)**

Where taxpayer's realty was without compensation to taxpayer used exclusively for public school purposes, the realty was exempt from taxation. Const. art. 13, § 1.

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Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Edna E. Ross and another against the City of Long Beach to recover taxes paid under protest. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Irving M. Smith, City Atty., and Joseph B. Lamb, Deputy City Atty., both of Long Beach, for appellant.

W. Ward Johnson and Frederic A. Shaffer, both of Long Beach, for respondents.

J. H. O'Connor, Co. Counsel, of Los Angeles, by Gordon Boller, Deputy Co. Counsel, of Los Angeles, for amicus curiae.

McCOMB, Justice.

This is an appeal from a judgment in favor of plaintiffs in an action to recover taxes paid under protest upon property owned by plaintiffs which they claim to be

exempt from taxation under article XIII, section 1, of the Constitution of California.

The appeal is on the judgment roll alone.

The complaint is in the usual form for a refund of taxes paid under protest, and after alleging ownership by plaintiffs of the property described in the complaint alleges as follows: "That there is now, and at all times herein mentioned has been, located upon said real property a building, and the entire premises, both said real property and building, are now and at all times herein mentioned, and ever since February 28, 1941, have been exclusively possessed and occupied by Long Beach City High School District of Los Angeles County, California, and during all such times said premises has been used exclusively as and for a public school."

Defendant filed a general demurrer to the complaint which was overruled with permission to answer within ten days. Defendant having failed to answer within the time allowed by the trial court, judgment was entered in favor of plaintiffs in conformity with the prayer of their complaint.

Defendant contends that the trial judge should have overruled the general demurrer to the complaint for the reason that when private property is leased to a public school district and used by the district for school purposes, such property is not exempt from taxation as against the lessor under article XIII, section 1, of the Constitution of California.

[1] Defendant's contention is untenable in the instant case and is governed by the following pertinent rules of law:

1) When an appeal is taken on the judgment roll alone, the appellate court is confined in its review to the facts appearing upon the face of the record, and is precluded from considering any fact or facts not a part thereof. (Ward v. Ward, 15 Cal.2d 234, 236, 100 P.2d 773; 2 Cal.Jur. (1921) section 231, page 484; 2 McK.Dig. (1930) Appeal and Error, section 513, 514, page 340, et seq.)

[2] 2) When property is used exclusively for public school purposes it is exempt from taxation from the very moment such use commences. (Article XIII, section 1, of the Constitution of California; Mings v. Compton City School Dist., 129 Cal.App. 413, 417 et seq., 18 P.2d 967).

3) Rule 2, supra, applies regardless of who may hold the legal title to the prop-

erty used exclusively for public school purposes. (Mings v. Compton City School Dist., supra, 129 Cal.App. 418, 18 P.2d 967.)

[3] Under rule 1), supra, we are confined in the present review, to the facts which appear in the record. These facts are:

a) Plaintiffs owned the property described in the complaint and paid thereon, under protest, taxes which had been assessed by defendant.

b) The property upon which taxes had been paid had been used exclusively for public school purposes.

c) Proper claim had been filed with defendant for a refund of the taxes paid by plaintiffs.

[4] Applying rules 2) and 3), supra, to the foregoing facts, it is clear that plaintiffs' property was exempt from taxation since it was used exclusively for public school purposes.

Defendant's and Amicus Curiae's arguments, and their authorities in support thereof, to the effect that plaintiffs' property was not exempt from taxation, are predicated on the assumption that plaintiffs leased to the Long Beach City High School District of Los Angeles the property described in the complaint. This assumption of fact is without support in the record. There is no allegation in the complaint, or in any other document in the judgment roll, showing that plaintiffs leased the property to the school district; for aught that appears here, plaintiffs may have donated the use of their property for school purposes.

Jefferson Standard Life Ins. Co. v. City of Wildwood, 1935, 118 Fla. 771, 160 So. 208; Washburn v. Goodheart, 1878, 88 Ill. 229; Turnverein Lincoln v. Board of Appeals, 1934, 358 Ill. 135, 192 N.E. 780; Travelers' Insurance Co. v. Kent, 1898, 151 Ind. 349, 50 N.E. 562, 51 N.E. 723; Spohn v. Stark, 1926, 197 Ind. 299, 150 N.E. 787; Laurent v. City of Muscatine, 1882, 59 Iowa 404, 13 N.W. 409; County of Hennepin v. Bell (State v. Bell), 1890, 43 Minn. 344, 45 N.W. 615; State ex rel. Hammer v. Macgurn, 1905, 187 Mo. 238, 86 S.W. 138; Carteret Academy v. State Board, 1926, 102 N.J.L. 525, 133 A. 886; Corporation Commission v. Seminary Construction Company, 1912, 160 N.C. 582, 76 S.E. 640; South Dakota Sigma Chapter House Ass'n, etc., v. Clay, 1937, 65 S.D. 559, 276 N.W. 258; Norwegian Lutheran Church v.

Wooster, 1934, 176 Wash. 581, 30 P.2d 381; and Conn v. Ringer, 6 Cir., 32 F.2d 639,\* are not here in point. The foregoing cases relied upon by defendant and Amicus Curiae are factually distinguishable from the instant case. In each of the cases cited the record disclosed that the owner of the property had received compensation for the use of his property, which fact as pointed out above is not present in this case. Therefore, if for no other reason, such cases are not of value in deciding the present case.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



59 Cal.App.2d 242

**PAINE v. BANK OF CERES.**

Civ. 12401.

District Court of Appeal, First District,  
Division 1, California.

June 17, 1943.

**1. Chattel mortgages** ⇨253

Even though an oral understanding to postpone payment due on chattel mortgage would not be legally binding as a "contract", the mortgagee was precluded on principles of "waiver" and "estoppel" from reinstating the written obligation without notice to the mortgagor, who had relied on oral agreement, and giving him a reasonable opportunity to meet his obligation.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract", "Estoppel" and "Waiver".

**2. Chattel mortgages** ⇨176(4)

In action by mortgagor against mortgagee for conversion of cattle covered by

chattel mortgage, evidence showed that mortgagor relied on oral agreement to postpone February, 1941, payment.

**3. Chattel mortgages** ⇨176(1, 6)

Chattel mortgage did not preclude mortgagor from instituting an action for conversion of mortgaged cattle by reason of wrongful sale by mortgagee, and the condition of the cattle, and whether mortgagor had performed the other conditions of the mortgage were for jury.

**4. Trover and conversion** ⇨40(6)

In action for conversion, direct testimony as to the value of each head of cattle is not required if there is sufficient evidence of quality and quantity to make a fair and reasonable estimate.

**5. Damages** ⇨6

Difficulty in ascertaining damages does not relieve a party at fault.

**6. Chattel mortgages** ⇨176(5)

In action by mortgagor against mortgagee for wrongful conversion of mortgaged cattle, the amount of damages fixed was an approximation to accuracy, which was all that was required.

**7. Appeal and error** ⇨1033(9)

Where record showed that amount fixed was lower than jury should reasonably have fixed as damages, a reviewing court could not disturb verdict.

**8. Chattel mortgages** ⇨176(6)

In action by mortgagor against mortgagee for conversion of mortgaged cattle, whether mortgagor voluntarily accepted surplus arising from sale of cattle was for jury.

**9. Chattel mortgages** ⇨176(6)

In action by mortgagor against mortgagee for conversion of mortgaged cattle, whether surplus arising from sale of cattle was paid to plaintiff or to constable for benefit of certain attaching creditors was for jury.

**10. Trial** ⇨261, 267(1)

A court may modify or ignore an instruction erroneous in part.

\*The following cases are in accord with the law as set forth in rules 2) and 3) of the opinion, and hold contra to the authorities relied on by defendant and Amicus Curiae: Anniston City Land Co. v. State, 1909, 160 Ala. 253, 48 So. 659, 661; State v. Church of the Advent, 1923, 208 Ala. 632, 95 So. 3, 4; State v. Alabama Educational Foundation, 1935,

231 Ala. 11, 163 So. 527, 529; Washburn College v. County of Shawnee, 1871, 8 Kan. 344 [Reprint page 233]; St. Mary's College v. Crowl, 1872, 10 Kan. 442 [Reprint pages 333, 338]; Scott v. Society of Russian Israelites et al., 1900, 59 Neb. 571, 81 N.W. 624; Gerke v. Purcell, 1874, 25 Ohio St. 229, 242.



**11. Chattel mortgages** ⇨285

A mortgagor may confirm a sale by acquiescence or by receiving the benefit of an amount received in excess of that due under the obligation.

**12. Chattel mortgages** ⇨292(1)

A mortgagor may not maintain action for illegal foreclosure if he has knowledge of illegal facts and does not protest, but it must be shown that his acceptance of proceeds was with such knowledge of the consequences of his acceptance that an inference, and not a surmise, may be drawn that mortgagor intended a ratification of the acts of the mortgagee and this is a "question of fact" for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

**13. Chattel mortgages** ⇨176(6)

In action by mortgagor against mortgagee for conversion of mortgaged cattle, instruction that if, after sale of cattle, mortgagor accepted money received in excess of amount necessary to pay indebtedness secured by mortgage, he thereby "waived" any irregularity that might have existed in seizure and sale of cattle and "ratified" such sale was properly refused as not covering the essentials necessary to determine whether a "ratification" had occurred.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification", "Ratify" and "Waive".

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Joe Paine against Bank of Ceres for alleged conversion based upon sale by defendant of plaintiff's cattle under a chattel mortgage. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Dennett & Paul, of Modesto, for appellant.

Nat Brown and C. H. Hogan, both of Stockton, for respondent.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiae on behalf of California Bankers Ass'n.

WARD, Justice.

This is an action for conversion, based upon the sale by defendant bank of plain-

tiff's cattle under a chattel mortgage. Judgment was rendered in favor of plaintiff and defendant appeals therefrom. The main question for decision is whether the plaintiff mortgagor was in default at the time possession of the cattle was taken under the mortgage.

On November 6, 1940, the plaintiff, Joe Paine, borrowed sixteen hundred dollars from defendant bank, for which he gave his note secured by a chattel mortgage on property, consisting, among other things, of fifty-eight head of dairy cattle and one hundred eighteen tons of hay. The note was payable on demand, with interest, but the parties agreed orally that payments of principal should be made thereon at the rate of \$100 a month.

In January of 1941 the bank, at the request of the purchaser of the milk from the Paine herd, agreed to postpone plaintiff's February payment of \$100. Early in February, plaintiff, his mother and step-father came into the bank and advised its vice-president and cashier, Arthur L. Harris, that plaintiff had sold some of the mortgaged cattle. Three cows had actually been sold, and plaintiff testified that he so advised Mr. Harris. The latter testified that plaintiff gave the number as two. The bank agreed that it would not take any action in the matter if plaintiff would thereafter "tend to business" and properly look after the cattle. On February 11, 1941, plaintiff's mother advised Mr. Harris that plaintiff could not be located and that the cattle were without feed. Mr. Harris immediately made a personal inspection of the herd. He testified that ten head had disappeared, and that those remaining were muddy, uncared for, and poor and emaciated for lack of food. He remained on the premises until six o'clock in the evening awaiting plaintiff's return for the milking. When he did not return, Mr. Harris furnished feed and engaged plaintiff's step-father to care for the cattle. Plaintiff testified that he learned that evening through an acquaintance that the bank had taken over the cattle. Mr. Harris testified that on the following day, he made a personal demand upon plaintiff, who had returned, for the payment of the note, advising him that the mortgaged cattle would be sold if the note were not paid. Plaintiff denied that payment of the note had ever been demanded of him, but there is evidence that between the date when his step-father was put in charge and the date of the sale of the cattle, he had made un-

successful attempts to secure a loan elsewhere. On March 7, 1941, the cattle were sold to the highest bidder, the bank receiving therefor the total sum of \$1,810. From this it paid itself the full amount due, \$1,556.37. While the balance was held by the bank for plaintiff, several attachments were levied thereon. Plaintiff came into the bank shortly thereafter with the constable, and there is testimony that Mr. Harris handed plaintiff a check for the amount due him; that plaintiff endorsed it; Mr. Harris cashed it, and that plaintiff turned over to the constable cash in the amount of the attachments. Plaintiff testified that he knew he was signing certain checks in favor of creditors but that Mr. Harris told him to sign and pay off the claims.

The appellant contends that respondent was in default; that he must be deemed to have ratified the sale of his cattle by accepting the surplus proceeds therefrom; that in any event there is not sufficient evidence of value upon which to base a judgment, and that the court erred in refusing to give certain instructions.

[1, 2] If plaintiff was not in default in his monthly payments, the bank acted without right in proceeding with the sale. While, as stated, the note was payable on demand, it was agreed, which is not disputed, and which subsequent events bear out, that plaintiff was to make monthly payments thereon of \$100. Appellant contends that there was no consideration for such an agreement. The evidence indicates that the installment payments were offered and accepted for a time; that shortly before the alleged conversion and sale, a representative of a milk company, doing business with respondent, requested of the bank a postponement of the February 1941 payment, to which the bank acquiesced. While the oral understanding relative to such postponement would not be legally binding as a contract, on principles of waiver and estoppel the bank was precluded from reinstating the written obligation without notice to the mortgagor. In other words, the mortgagee, assuming the mortgagor relied upon the postponement, could not treat the mortgage as in default without giving the mortgagor a reasonable opportunity to meet his obligation. The evidence and the factual surroundings show that the mortgagor knew of the postponement and relied thereon.

In reply, the bank does not expressly rely on the above default, nor does it claim to

have made a demand upon respondent prior to the date when it took possession of the cattle and placed his step-father in charge. Under the terms of the mortgage the mortgagor agreed to protect and preserve the property in good condition, etc. The mortgage further provided that whether the mortgagor had failed to do any act required therein should be left to the mortgagee's final and conclusive determination. This provision applied also to the question of whether a payment had been made. In the event that there was a decrease in the value of the property the mortgagor agreed to give further security to an extent that would be sufficient to offset the decreased value. There is no evidence that a demand was made just prior to the sale for additional security.

[3] As justifiable grounds for the sale the bank relies primarily upon the decrease and further anticipated decrease in the value of the security. Some of the cattle had been sold without consent of the bank. Whether the number was two or three, whether eight or ten had died or otherwise disappeared, or whether hay which was included as additional security had been sold, were matters of little financial consequence since the sale finally consummated returned to the bank the full amount of the unpaid balance of the loan. By the terms of the mortgage it was not contemplated that the mortgagor would be precluded from instituting an action for conversion of the property. The condition of the cattle, and whether plaintiff had performed the other conditions of the mortgage, were matters for the jury to determine.

Appellant bank contends that there is no evidence as to the value of the cattle. There is evidence that in January, prior to the sale, yearlings approximated \$30 a head; two-year olds, \$65 to \$70 a head; average milk cows, \$85 a head. Considering the cattle sold, those lost through death or otherwise, and that the condition of cattle when the sale took place in March was better than in January, the approximate value of the herd would be greater than the amount arrived at by the jury. There is evidence that the cattle were in fair condition as compared with other cattle in the vicinity.

[4-7] In an action for conversion, direct testimony as to the value of each head of cattle is not required if there is sufficient evidence of quality and quantity, so that a reasonable and fair estimate may be made.

65 Corpus Juris, p. 115, sec. 207. Difficulty in ascertaining damages does not relieve a party at fault. *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; *Overstreet v. Merritt*, 186 Cal. 494, 200 P. 11; *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386. If the amount of damages fixed was not accurate it was an "approximation to accuracy" (*Slater v. Pacific American Oil Co.*, 212 Cal. 648, 654, 300 P. 31), which is sufficient. The record here disclosed that the amount assessed was lower than the jury should reasonably have fixed. Under such circumstances a reviewing court is not in a position to disturb the amount of the verdict.

[8, 9] The contention of the bank that the mortgagor, in accepting the proceeds of the sale, ratified the action of the bank, appears at first blush to have merit, but upon examination must be rejected. The question whether plaintiff voluntarily accepted the surplus was not raised by the pleadings, but evidence upon that point was given during the trial. It was one for the determination of the jury, as was the question of whether from all the evidence the surplus was paid to plaintiff or to a constable for the benefit of certain attaching creditors. The bank submitted the following instruction upon this subject, which was refused: "You are further instructed that if you find that after the sale of the said property the said plaintiff, Joe Paine, accepted any money received in excess of the amount necessary to pay the indebtedness secured by said mortgage he thereby waived any irregularity that might have existed in the taking possession and the selling of the said property and ratified such sale."

[10-13] The above instruction was erroneous in part. The court may modify or ignore such an instruction. *Williamson v. Tobey*, 86 Cal. 497, 25 P. 65; *Hart v. Faris*, 218 Cal. 69, 21 P.2d 432; *Morris v. Purity Sausage Co.*, 2 Cal.App.2d 536, 38 P.2d 193. A mortgagor may confirm a sale by acquiescence or by receiving the benefit of an amount received in excess of that due under the obligation. *Jones on Mortgages*, 8th Ed., p. 1016, sec. 2469; *Mausert v. Mutual Distributing Co.*, 92 N.J.L. 190, 104 A. 203. A mortgagor may not maintain an action for illegal foreclosure if he has knowledge of the surrounding illegal facts and does not protest (*Merritt v. Ward*, 113 Ill.App. 208), but it must be shown that his acceptance of the proceeds

was with such knowledge of the consequences of his acceptance that an inference, and not a surmise, may be drawn that the mortgagor intended a ratification of the acts of the mortgagee. This is a question of fact for the jury to determine. The submitted instruction was properly refused. It did not cover the essentials necessary to determine whether a ratification had occurred. *Mausert v. Mutual Distributing Co.*, supra; *Merritt v. Ward*, supra.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



59 Cal.App.2d 219

PEOPLE v. GREEN.

Cr. 3700.

District Court of Appeal, Second District,  
Division 1, California.

June 16, 1943.

1. Gaming ☞98(1)

Evidence was sufficient to sustain conviction for recording and registering bets on horse races. Pen.Code, § 337a, subd. 4.

2. Criminal law ☞481

Question regarding qualification of expert witness is addressed to discretion of trial judge.

3. Criminal law ☞472

In prosecution for recording bets on horse races, testimony of an arresting officer, giving explanation of markings and pencil memoranda on documents and papers found on table at which defendant was seated when officers entered apartment of defendant, was not objectionable where there was nothing in record to warrant any concern over trial court's judgment regarding qualification of officer. Pen.Code, § 337a, subd. 4.

4. Criminal law ☞1169(1)

In prosecution for recording bets on horse races, admission of officer's testimony regarding declarations made by third parties who phoned defendant's apartment after defendant's arrest and during 45



minutes officers remained after the arrest was not prejudicial error, even if the testimony was "hearsay". Pen.Code, § 337a, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Morris Green was convicted of recording and registering bets on horse races, and he appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information with the violation of subdivision 2 of section 337a of the Penal Code and in a second count with the violation of subdivision 4 of said section. A jury having been duly waived, defendant was tried and adjudged guilty of the offense alleged in count 2 and not guilty as to count one. The appeal is from the judgment.

Count two alleges that said defendant did, on or about a certain date, "record and register a bet and bets and a wager and wagers upon the result and purported result of a trial and purported trial and contest of speed and power of endurance between beasts, to-wit, horses".

It is contended by appellant that the evidence is insufficient to support the judgment; that the court erred in admitting certain alleged hearsay evidence and that certain testimony of an officer was erroneously admitted.

Briefly, the record reveals that two officers entered the apartment of defendant unexpectedly and found defendant seated at a table upon which were certain documents and papers assertedly used routinely by bookmakers; that upon certain of said documents were found pencil notations;

that a telephone was on the table; that the officers remained there for about forty-five minutes, during which period one of the officers answered the phone several times; that defendant had occupied the apartment two days and that upon his arrest he admitted to the arresting officers that he had been taking bets.

[1] There is no merit to either of the first and third contentions. As to the sufficiency of the evidence, one of the two arresting officers was called as a witness for defendant and if there were any doubt as to the sufficiency of the evidence to support the judgment it is effectively removed by the evidence elicited from this witness.

[2,3] The testimony of the officer, which appellant argues was erroneously received, has to do with an explanation by one of the officers of the markings and pencil memoranda heretofore mentioned. The question as to the qualification of an expert is addressed to the judgment and discretion of the trial judge and there is nothing in the record on appeal herein to warrant any concern over the trial court's judgment in that regard.

[4] Appellant's contention that evidence of certain telephone conversations was hearsay is not without merit. One of the officers testified to declarations or statements made by third parties who phoned defendant's apartment after defendant's arrest and during the forty-five minutes the officers remained there. There were seven phone calls in all; the parties were not identified. Only one of the calls purported to relate directly to the offense alleged. It was the fifth call and was as follows: "Hello, Morris? Five more to win on Iron Hill; I gave you ten before, didn't I? O. K." Assuming, but not deciding, that such evidence was hearsay, nevertheless an examination of the entire cause does not justify the opinion that the errors complained of have resulted in a miscarriage of justice.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

59 Cal.App.2d 184

**CARPENTER v. BLANCHERI.**

Civ. 2857.

District Court of Appeal, Fourth District,  
California.

June 14, 1943.

**1. Physicians and surgeons** ◊18(5)

Where complaint alleged that dentist injected into plaintiff's arm a poisonous substance which necessitated a surgical operation and that dentist's treatment was negligent and not in accord with usual practice in the community, complaint was not limited to improper diagnosis or wrong remedy, and exclusion of evidence tending to show injection in a negligent manner was error.

**2. Physicians and surgeons** ◊18(9)

In action by patient against dentist for alleged malpractice because of injection of poisonous substance into plaintiff's arm which necessitated a surgical operation, evidence was for jury.

**3. Limitation of actions** ◊127(5)

Where complaint alleged that dentist injected into plaintiff's arm a poisonous substance which necessitated a surgical operation and that dentist's treatment was negligent and not in accord with usual practice in the community, refusal to permit amendment after running of statute of limitations so as to allege that defendant had missed the vein and that the injection had been negligently performed was error, since no "new cause of action" was alleged in proposed amendment. Code Civ.Proc. § 2055.

See Words and Phrases, Permanent Edition, for all other definitions of "New Cause of Action".

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by O. W. Carpenter against Raymond L. Blancheri for alleged malpractice. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

Joseph S. Campbell and Clarence Harden, both of San Diego, for appellant.

Monroe & McInnis, of San Diego, for respondent.

138 P.2d—26

BARNARD, Presiding Justice.

This is a malpractice action, the defendant being a dentist. So far as material here, the complaint alleged that the plaintiff employed the defendant to extract twenty-two teeth; that after twelve teeth had been extracted an infection developed in plaintiff's jaw; that on October 7, 1940, "the defendant injected into the plaintiff's right arm on the inside of the elbow with a hypodermic needle, a poisonous substance, the character and quantity of which was at said time, and still is, unknown to plaintiff"; that immediately thereafter said arm became very painful and began to swell, causing the plaintiff to become very sick; that plaintiff was compelled to and did call a physician to treat his arm; that on November 9, 1940, the plaintiff was compelled to undergo a surgical operation on his arm "to remove tissue, which surgical operation was made necessary by reason of the said defendant's injecting said poisonous substance in the plaintiff's said arm"; and that "the said treatment administered to the plaintiff by the defendant as above described was negligent and not in accordance with the usual and ordinary practice of dentistry in San Diego County." In his answer, the defendant admitted that on October 7, 1940, "he administered to plaintiff an intravenous injection for the purpose of counteracting and controlling infection in plaintiff's system", but denied all allegations relating to negligence on his part.

The action was tried before a jury. In his opening statement plaintiff's counsel stated, among other things, that he would prove that the defendant undertook to give the plaintiff an intravenous injection and that "he missed the vein." The defendant's counsel then stated that he would object to the introduction of any evidence to the effect that the defendant had negligently or unskillfully made this injection or that he had missed the vein. Briefly stated, it was contended that no such negligence was alleged in the complaint, that the complaint merely alleged an improper diagnosis and the giving of a treatment not recognized as proper by the profession, and that no evidence for the purpose of showing that the treatment was improperly administered was admissible. The court agreed with the defendant's theory and throughout the trial sustained objections to all questions designed to show that in making this injection the defendant had missed the vein or that

his manner of making the injection was in any way negligent or improper. Moreover, the court refused to permit the plaintiff to amend his complaint by alleging that the defendant had missed the vein and that the injection administered by him had been negligently and unskillfully performed. This amendment was refused on the ground that it would set up an entirely new cause of action and that the request therefor came too late, more than one year having elapsed since the cause of action accrued.

The defendant, called under section 2055 of the Code of Civil Procedure, testified that he gave the plaintiff a hypodermic injection on his right forearm near the elbow and that he administered "or attempted to administer a hypodermic, intravenous injection, in the plaintiff's arm"; that the drug he administered was "mapharsen"; that this drug might be poisonous if eaten but would not be poisonous if it was injected into someone's arm and the vein was missed; that the plaintiff complained of pain; that a little later the witness arranged for a physician to see the plaintiff and that when he reported this to the plaintiff he was informed that they had already called another doctor. The witness, however, was not allowed to answer a question as to whether or not he had inserted the needle in the vein in the plaintiff's arm.

The physician who was called by the plaintiff on October 7, 1940, testified that he examined the plaintiff's arm; that he determined that the trouble was caused by a "foreign body" in the arm; that he ascertained that the plaintiff had received an injection in the arm; that the foreign material in the arm was causing the trouble; that "when a foreign body is put in the tissues it is painful, particularly foreign bodies of the type he had injected in his arm"; that "this substance had been injected into the tissues"; and that "the injection of this mapharsen into the tissues of plaintiff's arm was the cause of the pain and the swelling." The witness was then not allowed to answer the question "Where then should it have been injected?" The witness then testified that mapharsen was a proper treatment for the condition that existed in plaintiff's mouth, but that he did not know whether or not it was the usual or ordinary practice for a dentist to give this treatment. Objections were then sustained to questions as to whether the manner in which this substance had been injected had

anything to do with the plaintiff's condition and as to whether he could determine whether or not the drug had been properly administered.

At the close of plaintiff's case a motion for a nonsuit was granted, and the plaintiff has appealed from the judgment entered in favor of the defendant.

[1,2] The main questions here presented are whether this complaint charges a negligent diagnosis only and whether, under the allegations thereof, all evidence with respect to the manner in which the treatment was administered was properly excluded. The complaint alleges that there was injected into the appellant's arm, with a hypodermic needle, a poisonous substance the character and quantity of which are unknown to the appellant, that a surgical operation to remove tissue was made necessary by this injection, and that the treatment thus administered was negligent and not in accord with the usual practice in that community. The gist of this charge is that through the negligent injection of this substance the tissues of the appellant's arm were so injured as to require surgical removal. While the complaint is not a model we think it cannot be said that, by its terms, it is confined to a charge of improper diagnosis and the use of the wrong remedy. The general allegations of negligence and of injury to the tissues of appellant's arm caused by this injection are broad enough to cover the injection of a proper substance in an improper manner or the injection of a substance that should not have been injected at all. If the respondent, although using a proper substance, missed the vein and injected it into the tissues where it ought not to be, it was still a negligent injection into the arm, which is alleged. The matter of whether or not the respondent "missed the vein" is a matter of proof rather than one of pleading. The complaint alleged that the respondent improperly injected something into the appellant's arm and it makes no difference, so far as the pleading is concerned, whether he injected the wrong substance or injected a proper substance in the wrong part of the arm. There was evidence that this substance was injected into the tissues of the appellant's arm, and that such an injection into the tissues would cause the sort of trouble which here resulted. Not only was this evidence disregarded by the court but the appellant was prevented, by the court's rul-



ings, from bringing out any direct evidence as to the manner in which the respondent had made this injection. The court erred in these respects and it follows that a nonsuit should not have been granted.

[3] If it be assumed that the complaint was not sufficient for the purpose above indicated no good reason appears for refusing to permit the amendment offered. We are unable to agree with the respondent's contention, and with the court's holding, that the amendment offered set up such a new or changed cause of action as to be improper under the circumstances which here appear. *Klopstock v. Superior Court*, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.



59 Cal.App.2d 222

**RINKER v. STATE BOARD OF MEDICAL EXAMINERS OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS et al.**

Civ. 14050.

District Court of Appeal, Second District,  
Division 2, California.

June 16, 1943.

Rehearing Denied July 7, 1943.

Hearing Denied Aug. 12, 1943.

**1. Physicians and surgeons ☞11(3)**

Proof of woman's pregnancy is not required to establish guilt of abortion in procuring miscarriage by her and authorize revocation of guilty person's license as physician and surgeon by State Board of Medical Examiners. Pen.Code, § 274; St.1937, p. 1274, § 2377.

**2. Mandamus ☞168(4)**

In mandamus proceeding to compel reinstatement of surgeon, whose license was revoked by State Board of Medical Examiners, evidence sustained trial court's finding that petitioner was guilty of unprofessional conduct in procuring or attempting to procure criminal abortion. St.1937, p. 1274, § 2377; Pen.Code, § 274.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge

Proceeding by Casper L. A. Rinker for a writ of mandate to compel the State Board of Medical Examiners of the Department of Professional and Vocational Standards to reinstate petitioner after revocation of his license as a physician and surgeon. From a judgment discharging an alternative writ and denying relief, petitioner appeals.

Affirmed.

Murray M. Chotiner, of Beverly Hills, and Horace Appel, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson and Allen L. Martin, Deputy Attys. Gen., for respondents.

W. J. WOOD, Justice.

Respondent Board of Medical Examiners of the State of California, after a hearing upon charges of unprofessional conduct, ordered the revocation of petitioner's license as a physician and surgeon. Petitioner sought a writ of mandate in the superior court to compel the Board to reinstate him. An alternative writ was issued and after a court trial judgment was entered discharging the alternative writ and denying relief to petitioner. From this judgment petitioner has appealed.

By stipulation of the parties the matter was submitted to the superior court upon a transcript of the evidence received by respondent Board. Petitioner now contends that the evidence is insufficient to establish jurisdiction in the Board to revoke the license. Petitioner was charged with unprofessional conduct in two counts. In the first count it is charged that in May, 1942, petitioner did " \* \* \* offer, agree, attempt, and did provide, supply, administer, procure, use and employ an instrument or substance or other means upon the person of one Pauline Shafer, a woman, with the wilful, unlawful and felonious intent then and thereby to procure a miscarriage of said Pauline Shafer, a woman, said use and employment of said instrument or substance or other means to procure said miscarriage of said Pauline Shafer, a woman, not then and there being necessary to preserve the life of said Pauline Shafer." In the second count a similar charge was made with reference to one Grace Sand. If the evidence is sufficient

to sustain the charge in either of these counts the judgment must be affirmed. We have concluded that the evidence on the first count is sufficient and therefore it will be unnecessary to refer to the evidence received on the second count.

Pauline Shafer testified that she was taken to the office of petitioner on May 29, 1942. At that time petitioner "injected a hypodermic" and gave her "a little yellow capsule". At the request of petitioner she got on the operating table where an anesthetic was administered and she became unconscious. When she regained consciousness she was on a cot in petitioner's office. Her abdomen "hurt a little". Petitioner helped her to get dressed and she noticed that she wore a sanitary napkin, which she had not previously worn. There was a bloody discharge for almost a month afterward. Prior to the date in question petitioner had been in normal health and her menstrual periods had been regular except that before May 29 she had missed two periods. She had had several acts of sexual intercourse with one Samuel Benavides prior to May 29. The petitioner had asked her if she was pregnant and she replied that she was "pretty sure" that she was. Meta Shafer testified that she is the mother of Pauline Shafer and that on May 29 she took her daughter to petitioner's office after an appointment had been made with petitioner by Benavides and paid to petitioner the sum of \$50, which had been supplied by Benavides. Samuel Benavides testified he had had several acts of sexual intercourse with Pauline Shafer about a month prior to May 29th; that he told petitioner that he was in trouble with a girl and that petitioner told him to bring the girl and her mother to his office and the charge would be \$50.

[1] Petitioner argues that the evidence is insufficient to establish that Pauline Shafer was pregnant on May 29, 1942. He relies upon *Lanterman v. Board of Medical Examiners of California*, 4 Cal.App.2d 319, 40 P.2d 913, where it was held that the evidence was insufficient to establish pregnancy and asserts that the evidence to establish pregnancy in the present case is no stronger than was the evidence in

the *Lanterman* case. It is unnecessary to decide whether the ruling in the *Lanterman* case should be followed or whether the facts in the two cases are substantially the same. The *Lanterman* case was decided when section 274 of the Penal Code provided that one is guilty of a felony "who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life \* \* \*." In 1935 the legislature amended section 274 by deleting the word "pregnant" in the first clause and the word "such" in the second clause. Statutes of 1935, Chap. 528, p. 1605. After the adoption of the amendment proof of pregnancy was not required to establish guilt of the crime commonly called abortion. Such has been the ruling in a number of jurisdictions where the statutes are similar to the present statute in California. *State v. Russell*, 1916, 90 Wash. 474, 156 P. 565; *People v. Axelsen*, 1918, 223 N.Y. 650, 119 N.E. 708; *Commonwealth v. Tibbetts*, 1893, 157 Mass. 519, 32 N.E. 910.

[2] An analysis of the evidence is not necessary to demonstrate that the trial court was justified in concluding that petitioner committed certain prohibited acts with the intent to cause a miscarriage upon the person of Pauline Shafer. Evidence is before the court that she was in normal health before the date in question and there is no evidence that the acts of petitioner were necessary to preserve her life. The evidence clearly sustains the finding that petitioner is guilty of the violation of section 2377 of the Business and Professions Code, St.1937, p. 1274, which provides: "The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion constitutes unprofessional conduct within the meaning of this chapter."

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

59 Cal.App.2d 277

**PEOPLE v. WALBECK.**  
**Cr. 555.**

District Court of Appeal, Fourth District,  
California.  
June 19, 1943.

**1. Larceny ☞57**

In prosecution for grand theft, intent of accused must rest on inferences which may reasonably be drawn from other facts and from actions of accused.

**2. Larceny ☞65**

Evidence was sufficient to sustain conviction for grand theft in the taking of certain household furniture.

**3. Criminal law ☞1166½(12)**

In prosecution for grand theft of household furniture, where furniture was conceded to be worth more than \$200, statements of trial judge made in connection with attempts to bring out testimony relating to size, description, condition and value of furniture and in an effort to keep testimony within reasonable bounds were not prejudicially erroneous.

**4. Criminal law ☞1170½(5)**

In prosecution for grand theft, error, if any, in cross examination of defendant regarding whether she had been intoxicated at time sheriff entered her home under search warrant was not prejudicial, since it could not have affected result and no request was made to have jury instructed to disregard it.

**5. Criminal law ☞823(1)**

In prosecution for grand theft, giving instruction to effect that to acquire title to personalty under claim of lien it is necessary to foreclose lien was not prejudicial error in view of other instructions.

**6. Criminal law ☞829(3)**

Refusing defendant's requested instructions bearing on defendant's intent was not error, where everything material and proper in requested instructions was fully covered in instructions which were given.

**7. Criminal law ☞1169(1)**

In prosecution for grand theft of certain household furniture, refusing to permit defendant's husband to testify concerning his having consulted an attorney with ref-

erence to husband's right and title in and to furniture was not reversible error, where defendant was allowed to testify that she had consulted an attorney and had been advised that she was owner of furniture.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Laura Walbeck was convicted of grand theft, and she appeals.

Affirmed.

Charleville & Weddell and Harry H. Parsons, all of San Bernardino, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

A jury convicted the defendant of grand theft in the taking of certain household furniture belonging to one Charles Hewins. She has appealed from the judgment and from an order denying her motion for a new trial.

In 1933, Mr. Hewins located a mining claim in the mountains near San Bernardino. He built two cabins and a large house. He lived in the latter, having therein a large amount of furniture, including some old family silver and dishes and a few pieces claimed to be antiques. In 1935, Mr. Walbeck came to work for Hewins and lived at his home for some eighteen months, during which time he did some work for Mr. Hewins and also worked elsewhere. He seems to have left the Hewins home in the summer of 1937, but apparently remained in the neighborhood. In May, 1939, he bought eighty acres of land which adjoined the Hewins claim. Sometime later, although the exact time does not appear, a survey was made and it was discovered that Mr. Hewins' house and two cabins were on the land which Walbeck had purchased. In June, 1939, the defendant, who had lived in the vicinity since 1937, married Walbeck. Thereafter, they lived in a house a few hundred yards from the Hewins home.

In the spring of 1940, Hewins and his wife left their house and after spending a few months in Santa Ana went to Arizona where they remained for some two years. They left their furniture in the house, leav-



ing it in charge of a caretaker, Mr. Martin, who was allowed to live in one of the cabins. On August 1, 1941, Martin left and wrote to Hewins in Arizona informing him of that fact. Before leaving, he nailed the windows of the Hewins house shut and locked all the doors, the front door being locked with a heavy bolt on the inside and the back door with a padlock on the outside. He also locked the front gate with a chain and padlock. About a month later he drove by the property and observed that the chain on the front gate had been cut and that Mr. and Mrs. Walbeck were living in the house.

A few days after August 1, 1941, Mr. and Mrs. Walbeck moved into the Hewins house and took possession of the furniture therein. On August 14, 1941, the defendant secured a loan of \$334.56 from a finance company, giving a mortgage on this furniture as partial security. On August 29, 1941, the defendant delivered four pieces of this furniture to a dealer in Ontario for the purpose of having it reupholstered. Later, upon her failure to pay his bill, he repossessed these articles. In October, 1941, the defendant applied to the finance company for a larger loan on the furniture. While the finance company then appraised the furniture at about \$2,000, for some reason a further loan was refused. In January, 1942, through an auctioneer in Los Angeles, the defendant sold several articles of this furniture, which were claimed to be antiques, for \$147. In March, 1942, Mr. Walbeck went to a hospital and the defendant removed to a house in San Bernardino, taking with her a large part of the furniture from the Hewins house. A few days later, Mr. Walbeck gave the defendant a deed to the real property on which the Hewins house was situated and also a bill of sale covering the furniture in question. Mr. and Mrs. Hewins returned to their home in October, 1942, and finding practically all of their furniture gone, complained to the officers. A search warrant was issued and a large part of the furniture was found in the house in San Bernardino occupied by the defendant, and other portions were found in other places.

The main question here presented is whether the evidence is sufficient to support the implied finding of a felonious intent on the part of the defendant. It is conceded that the defendant took possession of this furniture and sold and disposed of portions thereof, and it was stipulated at the trial

that its value was more than \$200. However, it has been earnestly contended throughout that she honestly believed that she owned it. This contention is based upon the claim that Hewins had either conveyed this furniture to Mr. Walbeck or had pledged it to him as security for a debt, and that Mr. Walbeck had made an oral gift of the furniture to the defendant at the time she took possession thereof in August, 1941, which was followed by a bill of sale in March, 1942. Mr. Walbeck testified that in August, 1937, Mr. Hewins borrowed \$65 from him "under the promise if he did not pay it back within three months, I could have everything there was in the house." At another time he testified that he understood this to be a pledge as security for the money thus loaned, that Mr. Hewins then owed him about \$1,800 for work he had performed in the preceding eighteen months, and that he considered this pledge as also securing that debt. He admitted, however, that he had neither given any notice nor made any attempt to foreclose any pledge or lien, and that he had done nothing pursuant thereto until he and his wife took possession of the furniture four years later and just after the caretaker left.

Hewins admitted having borrowed this \$65 but testified that he paid it back in September, 1938. He denied that he owed Mr. Walbeck \$1,800, or any other amount, as wages. An attorney who had represented Hewins testified that in the latter part of 1938, Mr. Walbeck had told him that there were no wages due to him from Hewins. This attorney also testified that on September 4, 1941, he wrote a letter to Mr. Walbeck telling him that he had no rights in the furniture. While Mr. Walbeck denied that he had ever received this letter the testimony of the defendant justifies the inference that he did and that she knew of it. In August, 1939, Mr. Walbeck brought a suit against Mr. Hewins for \$1,900 covering money alleged to have been loaned to Hewins and wages alleged to be due from him for services from 1936 to 1938. In connection with an attachment which was then levied on certain real property Mr. Walbeck signed an affidavit in which he stated that he had no lien or other security for the indebtedness. This action was later dismissed by reason of the failure of the plaintiff to appear. The defendant testified that she consulted a lawyer, the time of which does not appear, and that, thereafter,

er, she believed that she owned this furniture. She also admitted that she told the officer who came to her home with a search warrant that he would not find the property he was looking for because it was in some eastern state.

[1,2] The defendant admitted that she took this furniture and treated it as her own, and sought to establish that she in good faith believed that it belonged to her husband and that he had a right to give it to her. Whether she had such an honest belief, or took the furniture with a felonious intent, was the principal issue in the case. The evidence relating to this issue was conflicting and naturally there was no direct evidence of a felonious intent. In such cases proof of the intent of the accused must, of necessity, rest upon inferences which may reasonably be drawn from other facts and from the actions of the party in question. It clearly appears that this defendant took a leading part in taking possession of this furniture and that she immediately and continuously exercised complete control over it. She mortgaged it and tried to increase the loan on it, she had portions of it repaired, she sold some of it, and she moved a part of it and stored other portions. Whether she honestly believed she had a right to do this was a question of fact for the jury. Aside from the conflicting evidence in that connection, her husband's claim that four years before he had been given a right to or interest in the furniture as security for debts owed to him, with the agreement that the furniture was to become his if the debt was not paid within three months, is one that does not inspire confidence. This is especially true since he made no demand and no attempt to claim the furniture during the several years during which the Hewins continued to occupy the house in which it was situated, or while their caretaker was in charge. The possession of the furniture was taken after the caretaker had left, while Mr. and Mrs. Hewins were absent in Arizona, and without notice or any attempt to establish a right thereto. In addition to the suspicious nature of the general circumstances a number of inconsistencies, and even contradictions, appear in the testimony of the defendant and her husband which may well have caused the jury to disbelieve the story on which she relies. In our opinion, the evidence, with the reasonable inferences therefrom, supports the

implied finding of the jury and the verdict, and the same may not be disturbed on appeal. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

[3] It is contended that the trial judge was guilty of misconduct in revealing a prejudice against the defendant through certain statements made to counsel, and that other statements made by him clearly indicate that he entertained the erroneous theory that the only issue was as to whether or not the defendant had acquired a legal title to this furniture. Not only was no objection made to these statements at the time, but when they are considered with their context no impropriety or prejudice appears. Although the fact that this furniture was worth more than \$200 was conceded, innumerable attempts were made to bring out testimony relating to the size, description, condition and value of the furniture, item by item, and to go into many other matters which were immaterial under the circumstances. The statements objected to were made in connection with such immaterial matters and in an effort to keep the testimony within reasonable bounds. Moreover, the court clearly stated that in view of the concessions made the main issue to be determined was whether the defendant honestly believed she was entitled to take the property. The jury was properly instructed in that regard and, so far as we can see from the record, the case was thoroughly tried on that theory.

[4] The contention that the district attorney was guilty of prejudicial misconduct justifying a reversal cannot be sustained. Two of the assignments made in this connection are not supported by the record. Another involves a misinterpretation of what was said in making an objection to a question asked of the defendant. The only one involving any possible impropriety was in asking the defendant on cross examination whether she had not been intoxicated at the time the sheriff entered her home under a search warrant. Assuming that this was improper, although some justification appears in the evidence just preceding and immediately following this question, any possible error could not have affected the result. Moreover, no request was made to have the jury instructed to disregard it.

[5,6] It is next contended that the court erred in giving a certain instruction to the effect that in order to acquire title

to personal property under a claim of lien it is necessary to foreclose the lien by proper legal proceedings, and that if the jury should find that Mr. Walbeck's only claim of title was through the exercise of purported lien rights, and should further find that he did not foreclose such a lien through any legal proceedings, it should find that he had not acquired a legal title which he could transfer to the defendant. No argument is presented other than the statement that this instruction is erroneous "for the reasons heretofore in this brief set forth." This seems to refer to the argument that the case was tried upon an erroneous theory, to which we have referred. This instruction purported to cover but one phase of the matter under consideration. In other instructions, the jury was repeatedly told that it must acquit the defendant, regardless of who held the legal title to the furniture, if she took it in good faith and believing that she had a right to do so, even though her claim of title was untenable. The jury was also instructed that no one of the instructions contained all of the laws applicable to the issues involved, and that it should not single out any one or more of the instructions and consider it or them separate and apart from the other instructions. It is further argued that the court erred in refusing to give four instructions requested by the defendant bearing upon the intent of the defendant, and whether or not she had taken the furniture in good faith and believing she had a right to do so. Everything material and proper in these offered instructions was fully covered in instructions which were given. In at least four instructions, covering the subject fully and completely from various angles, the jury was told that it must acquit the defendant if it found that she took and retained possession of this property in good faith and under an honest belief that she had a lawful right to such possession.

[7] A number of assignments of error are made to rulings in connection with the admission of evidence. It would serve no useful purpose to review these matters, some of which are immaterial in view of the concession that the property involved was worth more than \$200, and others of which are either proper or of no importance. In the one of these rulings which is most questionable the court refused to permit the husband of the defendant to testify concerning his having consulted a law-

yer with reference to his right and title in and to this furniture. While we think it would have been better to have admitted this evidence, under the circumstances, the defendant herself was allowed to testify that she had consulted a lawyer and had been advised that she was the owner of this property and, at another time, that she had consulted another lawyer and thereafter believed that the property was hers. No reversible error appears in connection with any of these matters.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concur.



59 Cal.App.2d 203

**DICKEN et ux. v. SOUTHER et al.**

**Civ. 6805.**

District Court of Appeal, Third District,  
California.

June 15, 1943.

#### 1. Automobiles ⇐244(42)

In action arising out of collision between automobiles which met on blind curve, evidence supported implied finding that plaintiff was contributorily negligent in driving on wrong side of highway and failing to keep proper lookout.

#### 2. Negligence ⇐141(8)

The refusal of requested instruction, which immediately followed requested instruction on contributory negligence, and which charged that to find that act or omission contributed proximately to cause of accident jury must find that such act or omission, in natural and continuous sequence, unbroken by any efficient, intervening cause, produced accident, and without which accident would not have occurred, was proper.

#### 3. Negligence ⇐82

Contributory negligence need not be the sole and only act or omission which directly causes accident and except for which accident would not have occurred to



bar recovery, but if plaintiff's negligence merely concurs or cooperates to some substantial extent with defendant's conduct so as to proximately cause accident, recovery is barred.

#### 4. Negligence ⇐82

The doctrine of "contributory negligence" which will bar recovery is based on such act or omission by plaintiff amounting to want of ordinary care as, concurring or cooperating with defendant's negligent act, was proximate cause of injury complained of.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

#### 5. Appeal and error ⇐216(1)

Plaintiffs could not complain of trial court's failure to give to jury, on its own motion, definition of term "proximate cause of injury", where plaintiffs offered no instruction on such subject other than an erroneous one which was refused, although court asked for further requests.

#### 6. Negligence ⇐93(2)

Contributory negligence of husband in operation of automobile would be imputed to wife who was accompanying him and would preclude both from recovering damages arising out of collision on the principle that damages would become community property which would inure to husband's benefit.

#### 7. Trial ⇐296(4)

In action by husband and wife arising out of automobile collision, error, if any, in formula instruction on imputed negligence did not result in prejudice to plaintiffs or "miscarriage of justice" because of failure to refer to last clear chance doctrine, where jury was elsewhere fully and correctly instructed on contributory negligence. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

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Appeal from Superior Court, Amador County; Andrew R. Schottky, Judge.

Action by Elmer F. Dicken and wife against Oliver L. Souther and another, for damages growing out of an automobile collision. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Gumpert & Mazzer, of Stockton, and Wm. Snyder, of Jackson, for appellants.

Butler, Van Dyke & Harris, of Sacramento, for respondent Souther.

Ralph McGee and Albert J. Brown, both of Jackson, for respondent Belama Corporation.

#### THOMPSON, Justice.

The plaintiffs have appealed from a judgment which was rendered against them in a suit for damages growing out of an automobile collision. The cause was tried with a jury which returned a verdict in favor of the defendants. A motion for new trial was denied.

A reversal of the judgment is sought on the ground that the court erred in its charge to the jury. It is asserted the court improperly refused plaintiffs' instruction number 12, defining the term "proximate cause" with relation to contributory negligence. It is also claimed defendants' instruction number 10, on the subject of contributory negligence, which is characterized as a formula instruction, constituted reversible error because it failed to include a reference to the doctrine of the "last clear chance".

On August 28, 1940, at 7:30 o'clock a. m., the plaintiffs, who are husband and wife, were riding in their Chrysler sedan automobile easterly along the public highway toward Jackson. Mr. Dicken was operating the machine. The highway is paved 14 feet in width. It extends through a mountainous country in the vicinity where the accident occurred. At that place the highway runs in an easterly and westerly direction, but in its course describes a letter "S". On the north side there is a three-foot shoulder beyond which there is an abrupt descent into a deep canyon. On the south side a steep embankment rises from the edge of the roadway to a height of 14 feet, obscuring the view from the highway on either side. That portion of the roadway is termed a "blind curve".

[1] The plaintiffs claim they were traveling at a speed of only 20 miles an hour. As the plaintiffs entered upon this curve from the west, the defendant, Oliver L. Souther, who was operating a Ford coupe on a business enterprise for his codefendant, Belama Corporation, started to drive around the same curve from the east. Mr. Souther was returning from his employment in the corporation's mine at Jackson.

The occupants of neither machine had any previous knowledge of the presence of the other machine. It satisfactorily appears that Mr. Souther was driving on his proper side of the highway at a speed of about 35 or 40 miles an hour. As he rounded the curve on the northerly side of the roadway adjacent to the canyon he first observed the plaintiffs' car also approaching from the opposite direction on the northerly side of the highway. There is a conflict of evidence regarding the positions of the respective machines and the conduct of their drivers just before the accident occurred, but Mr. Souther testified that Mr. Dicken continued to drive his machine on the northerly side of the highway until he reached a point 50 or 75 feet distant. He also said that Dicken was then gazing out into the canyon, and that he continued to do so until his wife, who sat by his side, called his attention to the approaching machine by touching his arm. The plaintiffs disputed this statement. Mr. Souther sounded his horn to warn Dicken of the danger. Being unable to turn his machine to his right on account of the proximity of the gulch and believing that a collision was otherwise inevitable, Mr. Souther, in the emergency, suddenly pulled his automobile sharply to his left and crossed to the southerly side of the road close to the embankment. Suddenly realizing his danger, Mr. Dicken also swerved to his right, and a collision occurred on the southerly side of the roadway. Both men applied their brakes as they turned their machines to avoid the collision. Skid marks on the pavement corroborated the fact that both cars were traveling on the northerly side of the highway before the accident occurred. In a conversation which occurred just after the collision took place, Mr. Dicken admitted that he was traveling on the northerly side of the highway. Mr. Souther testified regarding the cause of the accident: "I gave him the horn and I seen that he was looking into the canyon, and when I gave him the horn he didn't respond and I seen it was either a head-on collision or try to miss him, so I tried to—I turned to the south to avoid the accident, and he also—his wife heard the horn and she caught his arm, so in the meantime he tried to straighten back to his side of the road; then, of course, it was too late for me to get back on my side."

The foregoing evidence is sufficient to support the implied finding of the jury

that the plaintiff, Elmer F. Dicken, was guilty of contributory negligence.

[2] The appellants assign as reversible error the court's refusal to give to the jury their proffered instruction number 12. We think it was properly rejected under the circumstances of this case because it is misleading and erroneous. It may be a correct statement of law applicable to a case based on the negligence of a defendant in which the defense of contributory negligence is not an issue. In the present case the defendants relied chiefly on their plea of contributory negligence as a defense to the action. While this refused instruction purports to define the term "proximate cause of accident", it is clearly directed toward the doctrine of contributory negligence as a defense which might prevent them from recovering a judgment. In fact, it followed immediately their instruction number 11, which was upon the subject of contributory negligence. The rejected instruction reads: "You are instructed that in order to find that an act or an omission contributed proximately to the cause of the accident in question, you must find that such act or omission, in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the accident, and without which the accident would not have occurred. The act or omission must be the efficient cause—that is, the cause that necessarily sets in operation the factors that accomplish the accident."

In effect, the foregoing instruction informs the jury that even though they find that the negligence of the plaintiffs in driving their automobile on the wrong side of the highway contributed toward the accident, it would not deprive them of the right to recover damages unless it was the sole and only negligent act "without which the accident would not have occurred." Certainly that is not a correct statement of the law applicable to a case in which the defendants rely on the defense of contributory negligence. The court gave an instruction in this case on the subject of contributory negligence which correctly stated the principle that if the jury found that the negligent acts of the plaintiffs contributed *in any degree* as a proximate cause of accident, it was a perfect defense to the action. That instruction reads in part: "This is known as the defense of contributory negligence. To establish this defense, unless it is made to appear from plaintiffs'

own evidence, the burden is upon the defendant to prove by a preponderance of the evidence that plaintiff Elmer F. Dicken was negligent in the operation of said Chrysler automobile and that such negligence on his part, if any, *contributed in some degree as a proximate cause of the injuries complained of.*" (Italics added.)

[3, 4] It is not true, in a suit where contributory negligence is an issue, that the negligence of the plaintiff must be the sole and only act or omission which directly causes the accident, and except for which the accident would not occur, to prohibit him from recovery on that ground. If a plaintiff's negligent acts or omissions merely concur or cooperate to some substantial extent with the acts and conduct of a defendant so as to proximately cause the accident, the plaintiff will be barred from recovery. Many California cases have so held. The doctrine of contributory negligence which will prohibit a plaintiff from recovering damages for injuries received is based on "such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, *concurring or co-operating* with the negligent act of a defendant, was the proximate cause of the injury complained of." *Gaster v. Hinkley*, 85 Cal.App. 55, 62, 258 P. 988, 991; *Montijo v. Samuel Goldwyn, Inc.*, 113 Cal.App. 57, 65, 297 P. 949; *Church v. Payne*, 36 Cal.App.2d 382, 386, 97 P.2d 819; 19 Cal. Jur. 644, sec. 74.

In the case of *Church v. Payne*, supra, which is similar in regard to the issue which is here involved, an instruction to that effect appearing on page 386 of 36 Cal.App.2d, at page 822 of 97 P.2d, was approved in the following language: "If you find from a preponderance of the evidence in this case that the plaintiff's injuries, if any, resulted from the combined negligence of the plaintiff and the defendant Marie Payne, such combined negligence, if any, both proximately contributing to the happening of the accident, then I charge you the plaintiff cannot recover."

For the foregoing reason we conclude that the instruction in this case was properly refused.

[5] The plaintiffs may not complain of the court's failure to give to the jury, on its own motion, a definition of the term "proximate cause of injury." They offered no instruction on that subject other than

the erroneous one previously mentioned. After knowing that instruction had been rejected because it was not read to the jury, and after the jury had retired to deliberate on their verdict and subsequently returned into court for further instructions on the subject of contributory negligence which were again read to the jury, the court asked respective counsel if there were any other instructions which they wished to then offer for the jury. The plaintiffs failed to suggest the giving of an instruction defining the term "proximate cause of injury." No other instructions were then requested by plaintiffs. The failure to present a proper instruction on that subject prevents the plaintiffs from complaining on appeal of the court's failure to give the definition as an instruction to the jury. *Brower v. Arnstein*, 126 Cal. App. 291, 299, 14 P.2d 863; *Putnam v. Pickwick Stages*, 98 Cal.App. 268, 274, 276 P. 1055.

The plaintiffs contend that their instruction number 15, which was given to the jury on the subject of the "last clear chance," and defendants' instruction number 10, which was also given to the jury, are prejudicially conflicting, for the reason that the last mentioned one does not include, as an exception to its application, the doctrine of the last clear chance. At the request of the plaintiffs the jury was separately fully and correctly charged regarding the doctrine of the last clear chance. The defendants earnestly contend the plaintiffs were not entitled to that instruction under the circumstances of this case. There is a serious doubt whether the instruction on the last clear chance should have been given to the jury, for the reason that the necessary elements which render it applicable appear to have been absent. But assuming, without so deciding, that it was properly given, we are of the impression the failure to refer to it in defendants' so-called formula instruction did not mislead the jury. The record appears to refute the assumption that the plaintiffs were prejudiced thereby.

In the formula instruction on the subject of imputing the negligence of a husband to his wife so as to preclude both of them from recovering for her injuries, the plaintiffs' instruction on the last clear chance was not referred to. If the doctrine of last clear chance was a proper issue, it was not called to the attention of the



jury in that challenged instruction on imputed contributory negligence.

The jury was elsewhere fully and correctly instructed on the subject of contributory negligence. Defendants' challenged formula instruction reads in part: "If, therefore, you find from a preponderance of the evidence in this case that plaintiff Elmer F. Dicken was careless or negligent in the operation of the Chrysler automobile in which his wife Gertrude B. Dicken was riding, and that such carelessness or negligence on his part, if any, contributed proximately to this accident, it will be your sworn duty to decide this case against both Mr. and Mrs. Dicken and to return a verdict exonerating the defendants from all liability to both plaintiffs."

[6] In this suit by both spouses for injuries sustained by the wife, and for damages for the loss of her services on that account, the jury was properly instructed that contributory negligence on the part of the husband would be imputed to his wife who accompanied him in the automobile, so as to preclude both of them from recovering damages, on the principle that such damages would become community property which would inure to the benefit of the spouse whose negligence contributed to the accident. *Solko v. Jones*, 117 Cal.App. 372, 374, 3 P.2d 1028; *Giorgetti v. Wollaston*, 83 Cal.App. 358, 362, 257 P. 109.

It is insisted that the language of this instruction on imputed contributory negligence, standing alone, deprived the plaintiffs of their independent right to recover on the doctrine of last clear chance, notwithstanding their contributory negligence. It is true that numerous California authorities have announced the doctrine that: "A so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law." *Douglas v. Southern Pac. Co.*, 203 Cal. 390, 393, 264 P. 237, 238; *Jordan v. Great Western Motorways*, 213 Cal. 606, 609, 2 P.2d 786; *Keller v. Pac. Tel. & Tel. Co.*, 2 Cal.App.2d 513, 521, 38 P.2d 182.

In the *Jordan* case, *supra* [213 Cal. 606, 2 P.2d 787], it is also said that: "The failure of a 'formula' instruction to contain a reference to a defense upon which no substantial evidence has been introduced cannot be said to be prejudicially erroneous."

[7] In the present case the doctrine of the last clear chance was not relied upon by the plaintiffs "as a defense." It is true that they offered the instruction on that subject as an additional reason for recovery in the event that the jury should also find them guilty of contributory negligence. To refute the theory of prejudice on account of failure to refer to the instruction regarding the last clear chance in the imputed contributory negligence instruction, it may be said, in the language of the *Jordan* case, that "no substantial evidence has been introduced" on the subject of last clear chance. Moreover, the record appears to refute the charge that the jury was misled by failure to include the doctrine of last clear chance in the imputed contributory negligence instruction. The jury was fully and correctly instructed regarding the doctrine of contributory negligence. After the jury had retired and considered the evidence for sometime, it returned into open court and requested further instructions on the subjects only, of: 1. The care which the driver of an automobile "must exercise to keep a lookout for approaching traffic," 2. The law on "*recovery of a driver asking damages where he is negligent*," and 3. "The law on preponderance of the evidence necessary for the plaintiff." These were the specific subjects upon which the foreman requested the court to further instruct the jury. It is significant that the jury did not ask for further instructions on the subject of the last clear chance. We may reasonably assume they had determined there was no substantial evidence to support that doctrine. The court thereupon reread to the jury all of the instructions on contributory negligence, and upon the other requested subjects with the exception of the challenged imputed contributory negligence instruction. The judge then asked the jurors if they desired any other instructions to be read to them, to which the foreman replied, "That's all." The judge then addressed himself to the respective attorneys, stating that if there were any other instructions previously given which they might desire him to reread he would be glad to do so. This was a specific invitation to the plaintiffs to then suggest the reading of their last clear chance instruction, if they relied upon it, or thought that the jury might be misled by the omission to refer to it in the imputed contributory negligence charge. Plaintiffs' attorneys then offered no suggestion regarding the application of their last clear chance in-

struction. We think this record reasonably infers that the jury was not misled or the plaintiffs prejudiced by the giving of the challenged instruction. Except for this last-mentioned instruction the jury was very fully and fairly charged on every material issue in the case.

After a careful examination of the record we are persuaded the verdict and judgment in this case did not result in a miscarriage of justice. Even conceding that the challenged instruction was an erroneous formula one, the provisions of Article VI, Section 4½, of the California

Constitution provides that "No judgment shall be set aside, or new trial granted, in any case, *on the ground of misdirection of the jury*, \* \* \* unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion *that the error complained of has resulted in a miscarriage of justice.*" We are convinced the giving of the instruction complained of did not result in a miscarriage of justice.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.





22 Cal.2d 269

**MERCURY HERALD CO. v. MOORE,**  
**County Auditor.**  
**S. F. 16809.**

Supreme Court of California.

June 1, 1943.

**1. Constitutional law** ☞139

Termination of right to redeem realty sold to state for taxes, as authorized by statute, does not "impair obligation of contract", as there is no contractual relationship between state and taxpayer, whose position is not that of "purchaser" entering into contract with state in purchasing property, which is sold, in exercise of sovereign power to collect tax, as result of taxpayer's failure to pay it. St.1941, pp. 136, 1425, 1426, 1428, 1429, §§ 3575, 3511.3, 3511.5, 3572, 3574; Pol.Code, §§ 3780, 3785, 3817c3, 3833 to 3834.25.

See Words and Phrases, Permanent Edition, for all other definitions of "Impair Obligation of Contract" and "Purchaser".

**2. Constitutional law** ☞285

**Taxation** ☞696

The statute providing for termination of right to redeem realty sold to state for taxes before state's sale thereof is not unconstitutional as depriving taxpayer of "property right" without "due process of law", as taxpayer, on execution of deed to state, forfeits all rights in property, except privilege of redeeming it, and thereafter has at most an offer, enabling him to regain title to property, which may be revoked by state at any time before acceptance. St.1941, pp. 136, 1425, 1426, 1428, 1429, 2463, §§ 3575, 3511.3, 3511.5, 3572, 3574, 3520; Pol.Code, § 3787.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Property Right".

**3. States** ☞89

The Legislature has full control over sale of state's property and may regulate or change at any time method of distribution thereof.

**4. Taxation** ☞696

While law in effect at time of tax sale to state governs redemption of property sold when Legislature does not provide otherwise, Legislature may make retroactive changes in method of redemption, but such changes cannot be arbitrary or capricious,

but must be reasonable when measured in light of public interest to be served and effect of changes on property owner's rights, which are not purely statutory and cannot be destroyed by mere repeal of statute. Pol.Code, § 327.

**5. Constitutional law** ☞107

The Legislature may validly limit time within which an existing right may be exercised, if period remaining for its assertion is reasonable.

**6. Taxation** ☞696

The statute providing for termination of right to redeem realty from tax sale to state on notice mailed to last assessee within year after June 1, 1942, if deed to state was executed before such date, and publication of such notice within 10 days after mailing, if property is not redeemed or installment payments commenced within four months after sending of notice, is not invalid as impairing right to redeem or limiting time for exercise thereof without providing for adequate notice and fair opportunity to regain property. St.1941, pp. 136, 1425, 1426, 1428, 1429, §§ 3575, 3511.3, 3511.5, 3572, 3574; Pol.Code, §§ 3780, 3785, 3817c3, 3833 to 3834.25.

**SHENK and CURTIS, JJ., dissenting.**

In Bank.

Proceeding in mandamus to compel the county auditor of Santa Clara County to issue a warrant. Peremptory writ granted.

Proceeding in mandamus by the Mercury Herald Company to compel Maurice Moore, as Auditor of Santa Clara County, to issue a warrant in payment of a claim for publication of a notice to terminate a right of redemption from a tax sale of realty to the state.

Peremptory writ granted.

For prior opinion, see 132 P.2d 818.

Francis E. Zingheim, of San Jose, for petitioners.

Paul A. McCarthy, of San Francisco, and Ernest A. Wilson and Kirkbride & Wilson, all of San Mateo, as amici curiae on behalf of petitioners.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., Adrian A. Kraggen, Deputy Atty. Gen., and John P. Fitzgerald, Dist. Atty., and Leonard R. Avilla, Deputy Dist. Atty., both of San Jose, for respondent.

TRAYNOR, Justice.

Petitioner seeks by this proceeding in mandamus to compel the Auditor of Santa Clara County to issue a warrant in payment of a claim for the publication of a notice to terminate the right of redemption pursuant to section 3574 of the Revenue and Taxation Code, St.1941, p. 1429.

The real property described in the published notice was sold to the state on June 29, 1935, for nonpayment of county taxes for 1934-35. The law at that time required the tax collector to publish an annual delinquent list of property on which taxes for the past year were not paid. If the taxes remained unpaid the property was sold to the state. The practical effect of such a sale was to start the running of the five-year period of redemption. *Crocker v. Scott*, 149 Cal. 575, 87 P. 102; *In re Seick*, 46 Cal.App. 363, 189 P. 314. If the property was not redeemed within the five years, or if the taxpayer failed to elect on or before April 20, 1936, to pay the delinquent taxes in installments Pol.Code, sec. 3817c3; extended to April 20, 1940, by Pol. Code, sec. 3817c7, Stats.1939, ch. 9, p. 13, the property was deeded to the state. Pol. Code, sec. 3785. Thereafter, under the law in effect when the property in question was deeded to the state on July 1, 1940, the property could be sold by the tax collector at public auction upon the direction of the board of supervisors of the county and the authorization of the State Controller, if notice of sale was mailed to the last assessee at least 21 days but not more than 28 days before the proposed sale, and notice thereof published once a week for three weeks starting at least 21 days before the sale. Pol.Code, secs. 3833-3834.25. If the state did not dispose of the property it remained subject to redemption. Pol.Code, secs. 3817c3, 3780.

In 1941 the Legislature provided for the termination of the right of redemption upon execution of the deed to the state as to all property not in distressed assessment districts, deeded to the state on and after June 1, 1942. Revenue and Taxation Code, secs. 3511.3, 3511.5, St.1941, p. 1425. If the deed to the state was executed before June 1, 1942, as in the present case, notice of termination must be mailed to the last assessee within one year after June 1, 1942, or within six months after default under a plan of installment payments, whichever of the two dates is later. Revenue and Taxation Code, sec. 3572. The tax col-

lector must also publish the notice of termination of right of redemption once in a newspaper of general circulation published in the county, or, if none, by posting in three conspicuous places in the county, as to every assessee for whom no address is known, and for all property assessed to unknown owners. The publication must be made within 10 days after the notice is mailed. Revenue and Taxation Code, sec. 3574. If the property is not redeemed or installment payments commenced within four months after sending the notice, the right of redemption is terminated. Revenue and Taxation Code, sec. 3575, St. 1941, p. 136. Since the legislation became effective June 1, 1941, the procedure that it established could not be set in motion for a year or more.

These provisions are an integral part of a plan to classify and rehabilitate tax-deeded property. The Legislature also provided for the appointment of a Land Classification Commission familiar with agricultural economics, real property taxation, conservation and regional planning, to classify tax-deeded property as desirable for public use, suitable for private ownership, or waste land. Chap. 47, Stats. 1st Extra Session, 1940, Stats.1941, p. 131. The statute seeks to expedite the restoration of real property to the tax rolls. To that end it provides for the termination of the right of redemption to facilitate the use or rehabilitation of tax-deeded land while enabling the state to dispose of it more quickly and at a better price.

[1] It is contended that the termination of the right of redemption of the property here in question impairs the obligation of a contract. There is no contractual relationship, however, between the taxpayer and the state. *Southern Service Co., Ltd., v. Los Angeles County*, 15 Cal.2d 1, 11, 97 P.2d 963; *Perry v. Washburn*, 20 Cal. 318, 350; *Spurrier v. Neumiller*, 37 Cal. App. 683, 174 P. 338. The position of the taxpayer is not that of a purchaser who enters into a contract with the state in purchasing the property. The taxpayer's own failure to pay the tax leads to the sale of the land as an exercise of the sovereign power to collect the tax. *Wood v. Lovett*, 313 U.S. 362, 371, 61 S.Ct. 983, 85 L.Ed. 1404; *Yates v. Hawkins*, 46 N.M. 249, 126 P.2d 476, 478; see *Anglo California Nat. Bank v. Leland*, 9 Cal.2d 347, 70 P.2d 937; *Robinson v. Howe*, 13 Wis. 341; *Muirhead v. Sands*, 111 Mich. 487, 69 N.W. 826, 828.

[2, 3] It is also contended that the right to redeem after the property has been deeded to the state but before it has been sold by the state is a property right, and that the legislation in question deprives the property owner of that right without due process of law. This contention takes no account of the distinction between the absolute right to redeem within the fixed period of five years from the date of sale to the state, and the conditional right to redeem once the property has been deeded to the state if the state does not sell the property. The deed to the state upon the expiration of the five-year period conveyed absolute title to the property free of any incumbrance except liens for certain taxes. Pol.Code, sec. 3787; Revenue & Taxation Code, sec. 3520. Upon execution of the deed the property owner forfeited all rights in the property except the privilege of redeeming it at any time before the state disposed of it. *Buck v. Canty*, 162 Cal. 226, 121 P. 924; *Fox v. Wright*, 152 Cal. 59, 91 P. 1005; *Baird v. Monroe*, 150 Cal. 560, 89 P. 352; *Helvey v. Bank of America*, 43 Cal.App.2d 532, 111 P.2d 390; *Curtin v. Kingsbury*, 31 Cal.App. 57, 61, 159 P. 830; *Chapman v. Zobelein*, 19 Cal.App. 132, 124 P. 1021, affirmed 237 U.S. 135, 35 S.Ct. 518, 59 L.Ed. 874; *Young v. Patterson*, 9 Cal.App. 469, 99 P. 552. The property owner thereafter had at most an offer enabling him to regain title to the property, which could be revoked by the state at any time before acceptance. As the court stated in *Buck v. Canty*, supra, "The Legislature has full control over the sale of property belonging to the state, which it may direct sold, and to regulate or change at any time the method of its disposition." 162 Cal. 226, 233, 121 P. 924, 927. In *South San Joaquin Irrigation District v. Neumiller*, 2 Cal.2d 485, 42 P.2d 64, the court reaffirmed the rule that the taxpayer had no vested right in the method adopted by the state for the disposition of its tax-deeded lands. The court declared: "The question is therefore narrowed to this: Does the person possessing a right to redeem also have a vested or such a substantial right in the method or conditions adopted by the state for the disposition by it of its tax deeded lands as would deprive the state of the power to change the method and terms of sale thereof, after it had received title to the lands? \* \* \* In the absence of constitutional limitations, and there is none here, the Legislature is free to dispose of

the state's tax deeded lands in any way deemed by it from time to time to be for the public interest \* \* \* It is clear from all the authorities and on reason that the person having the privilege of redemption has no right to the disposition by the state of its tax deeded lands in any particular way when, as here, his right of redemption is not adversely affected." 2 Cal.2d 485, 489, 42 P.2d 64, 66. See *Allen v. Peterson*, 38 Wash. 599, 80 P. 849.

[4] Even if there were no distinction between the right to redeem before deed to the state and after, a change in the method of redemption would not necessarily be contrary to due process of law. While the law in effect at the time of the sale to the state governs the redemption of the property when the Legislature does not provide otherwise, it is settled that the Legislature may make retroactive changes in the method of redemption. *Buck v. Canty*, supra; *Fox v. Wright*, supra; *Baird v. Monroe*, supra; *Wood v. Lovett*, supra; *League v. Texas*, 184 U.S. 156, 22 S.Ct. 475, 46 L.Ed. 478. This power is not unlimited, however. The changes cannot be arbitrary or capricious but must be reasonable when measured in the light of the public interest to be served and the effect of the changes upon the rights of the property owner. Those rights are not purely statutory and cannot be destroyed by the mere repeal of a statute. Cf. *Pol.Code, § 327*; *Southern Service Co., Ltd., v. Los Angeles County*, supra; *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 74 P.2d 252; *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; *Berg v. Traeger*, 210 Cal. 323, 292 P. 495; *Callet v. Alioto*, 210 Cal. 65, 290 P. 438; *Moss v. Smith*, 171 Cal. 777, 155 P. 90; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, Ann.Cas.1912B, 1148, 37 L.R.A., N.S., 934; *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 P. 322. At the time of the imposition of the tax the property is in private ownership, and the rights of the owner in that property, not being derived from statute, cannot be abrogated at will by the Legislature. When the tax is imposed the state prescribes the terms of payment and the conditions under which the property will be taken for nonpayment of the tax. By providing for the redemption of the property after sale to the state in the event of delinquency, the state does not take the property outright from the owner but allows him not only to retain the title but



the right to remove the tax lien and clear his title to the property. It does not follow that because the state could provide in the first instance for a complete taking of the property that it may with impunity provide retroactively for such a taking without giving the owner notice or a fair opportunity to prevent forfeiture of his property. See *Wood v. Lovett*, 313 U.S. 362, 371, 61 S.Ct. 983, 85 L.Ed. 1404.

[5] It is settled, however, that the Legislature may validly limit the time within which an existing right may be exercised if the period remaining for its assertion is a reasonable one. *Alexander, Inc., v. United States*, 5 Cir., 128 F.2d 82; *Allen v. Peterson*, supra; *Robinson v. Howe*, supra; *Muirhead v. Sands*, supra. This rule is akin to the rule that the Legislature may enact a statute of limitations applicable to existing causes of action or shorten a former limitation period if the time allowed to commence the action is reasonable. *Security First Nat. Bank v. Sartori*, 34 Cal.App.2d 408, 414, 415, 93 P.2d 863; see 16 Cal.Jur. 398; 34 Am.Jur. 44.

[6] In the present case the redemptioner clearly received adequate notice and a fair opportunity to regain the property. His position was in fact improved in several respects:

Old Method	New Method
1. Right of redemption terminated by sale at any time upon proper notice.	1. One year's delay before procedure became operative.
2. Twenty-one days' notice by mail and by publication.	2. Four months' notice by mail before termination; notice by publication within 10 days after notice mailed.
3. Right of redemption continues until terminated by sale; state not required to sell.	3. Right of redemption must be terminated by June 1, 1943, if property not redeemed or installment payments begun before that time.

The delay of a year in the new procedure unquestionably operates to the advantage of the taxpayer. Likewise, a four-months' notice is more advantageous to him than a twenty-one days' notice. As for the third difference, the Legislature could have provided that all tax-deeded property be sold by June 1, 1943, since it is free to determine what property shall or shall not be sold and when. *Bray v. Jones*, 20 Cal. 2d 858, 129 P.2d 357; *South San Joaquin Irrigation Dist. v. Neumiller*, supra; *Buck*

*v. Canty*, supra; *Merchants' Trust Co. v. Wright*, 161 Cal. 149, 118 P. 517; *Fox v. Wright*, supra. From the standpoint of the redemptioner's right there is little if anything to choose between such a provision and the one in question. Any objection that the termination must be by sale is met by the holding in *South San Joaquin Irrigation District v. Neumiller*, supra, that the person having the privilege of redemption has no right to a particular kind of disposition of tax-deeded property. The state would normally seek to sell the property to return it to the tax rolls. While it may delay in doing so the taxpayer under the old method could not rely on such delay with any certainty and confidently bide his time to redeem. Any hope he might have had of redeeming advantageously by waiting rested on mere speculation as to what the state would do. It was not grounded in any legal right, for the state had the unqualified right to sell at any time and for any price and thus terminate the right of redemption. *Buck v. Canty*, supra; *Fox v. Wright*, supra; *Baird v. Monroe*, supra.

It was held in *South San Joaquin Irrigation District v. Neumiller*, supra, that the state can change the method of disposing of tax-deeded property after receiving the title thereto, by selling the property to a municipality, irrigation district, reclamation district, or other public corporation for such price and upon such terms as may be agreed upon and thereby terminate the right of redemption. It can likewise terminate the right of redemption by selling the property to a public corporation created to administer tax-deeded property. Just as appropriately the state can retain the property directly and terminate the right of redemption by giving the former owner as much notice as he would receive if the state sold the property to others.

In the cases upon which respondent relies the legislation in question either substantially impaired the right of redemption without reasonable justification or involved only questions of statutory construction. In *Teralta Land & W. Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am.St.Rep. 194, the new act increased the amount required to redeem. *Collier v. Shaffer*, 137 Cal. 319 70 P. 177, was concerned with the construction of the statute and not with the constitutionality of any retroactive application thereof. The new law involved in *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892, and *Risso v. Crooks*, 217 Cal. 219, 17

P.2d 1001, did not purport to be retroactive and its constitutionality was therefore not in question. *San Diego County v. Childs*, 217 Cal. 109, 17 P.2d 734, and *Los Angeles County v. Rockhold*, 3 Cal.2d 192, 44 P.2d 340, 100 A.L.R. 149, concerned acts for refunding certain obligations of districts organized under the Acquisition and Improvement Act of 1925. They provided for radical changes in the right of property owners to redeem lands that had been sold for delinquent assessments, including reductions in the redemption period from five years to one year as well as additions to the amount necessary to redeem. Cf. *Los Angeles County v. Jones*, 6 Cal.2d 695, 59 P.2d 489; *City of Dunsmuir v. Porter*, 7 Cal.2d 269, 60 P.2d 836; *City of Los Angeles v. Aldrich*, 8 Cal.2d 541, 66 P.2d 647; *Culver City v. Reese*, 11 Cal.2d 441, 80 P.2d 992.

*King v. Samuel*, 7 Cal.App. 55, 93 P. 391; *Wetherbee v. Johnston*, 10 Cal.App. 264, 101 P. 802, and *Main v. Thornton*, 20 Cal. App. 194, 128 P. 766, were based upon *Johnson v. Taylor*, 150 Cal. 201, 88 P. 903, 906, 119 Am.St.Rep. 181, 10 L.R.A.,N.S., 318, upon which the defendant relies particularly. This case involved the validity of a tax deed made in 1899 pursuant to a sale in 1894. Under the law in effect when the sale was made the purchaser had to serve written notice upon the owner or occupant thirty days before the right of redemption expired or thirty days before applying for a deed. A deed could not be issued to the purchaser without the giving of this notice. The owner retained title until the execution of such deed and had at least one year after the sale and until thirty days after notice in which to redeem. In 1895 the Legislature adopted substantially the present system, providing that property be sold for delinquent taxes to the state, and if not redeemed within five years be deeded to the state, and that thereafter redemption might be made before entry or sale of the property by the state. In referring to this change the court declared: "To change a right of redemption which lasts indefinitely until the performance by a third party of some act which may or may not be performed, to a right limited by the expiration of a definite period of time, is a substantial change in the right." Respondent relies heavily upon this sentence, inferring a comparison between the right to redeem after deed to the state until the state sells, with the right under the old law in the *Johnson*

case to redeem within thirty days after the service of the notice. Actually the court found no basis for such a comparison, for it clearly regarded the right of redemption after the close of the five-year period as too insubstantial to be measured against the previously existing right, and measured instead the five-year period, only to find it also inferior. It would be inconsistent now to give the right formerly regarded as insubstantial the same value as the right formerly regarded as impaired. Even if the sentence in the *Johnson* case, relied upon by respondent, were lifted from the context of the facts before the court and read literally it would have no bearing upon the present case, where the right of redemption under the old law was terminated by the act, not of a third person without title to the property, but of the state itself as holder of the absolute title. *South San Joaquin Irrigation District v. Neumiller*, supra. The *Johnson* case involved the basic right of a property owner to receive notice of the prospective loss of title to his property. The notice did not terminate the right of redemption as sale by the state did, but gave warning that the right would be terminated if the owner did not redeem. "Under the old law the owner could rest secure until he received notice of intention to apply for a deed. He then had 30 days in which to redeem. Under the new law his right of redemption could be cut off at any moment after the expiration of the statutory period, without any personal notification to him. \* \* \* That these circumstances worked a substantial change in the rights which the owner had at the date of the sale seems clear." The impairment of the right in the *Johnson* case is in striking contrast to the absence of any proof of impairment in the present case.

Let a peremptory writ of mandate issue.

GIBSON, C. J., and SCHAUER, J., concurred.

EDMONDS, Justice (concurring).

I agree that a delinquent taxpayer has no vested right in an existing procedure for the collection of taxes. *Wood v. Lovett*, 313 U.S. 362, 371, 61 S.Ct. 983, 85 L.Ed. 1404; *League v. Texas*, 184 U.S. 156, 158, 22 S.Ct. 475, 46 L.Ed. 478. There is no contract between him and the state that the latter will not vary the method of collection. *Wood v. Lovett*, supra, 313 U.S. at page 371, 61 S.Ct. at page 987, 84 L.Ed. 1404;

*League v. Texas*, supra, 184 U.S. at page 158, 22 S.Ct. at page 476, 46 L.Ed. 478. Nor does a statute changing the procedure for the collection of unpaid taxes conflict with the due process clause of the Fourteenth Amendment to the federal Constitution merely because it is retroactive in operation. *League v. Texas*, supra, 184 U.S. at page 161, 22 S.Ct. at page 476, 46 L.Ed. 478; *Wood v. Lovett*, supra, 313 U.S. at page 371, 61 S.Ct. at page 987, 85 L.Ed. 1404. For these reasons the Supreme Court of the United States has held that a state constitutionally may impose interest upon delinquent taxes by a law enacted subsequent to the time of their accrual. *League v. Texas*, supra.

The due process clause does, however, prevent the state from taking one's liberty or property in an unreasonable and arbitrary manner. The private ownership of real property normally does not exist by virtue of a statutory grant, and the owner is entitled to notice of the fact that his property will be forfeited if he is delinquent in his obligations to the state. Prior to the enactment of the 1941 legislation, under the law governing the collection of taxes, the landowner was informed that only certain rights in his property immediately would be taken if he failed to pay the taxes levied upon it when due; that certain additional rights would be taken upon a default in payment of his tax obligations during the next five years, and his title forfeited if he did not pay the accrued amounts before the property was sold for taxes by the state to another. Revenue & Taxation Code, pts. 6, 7. And although no constitutional limitation requires the state to abide by these conditions for the collection of the tax, procedural due process demands that it must, in altering the procedure, give adequate notice of the change so as to afford the taxpayer a fair opportunity to prevent forfeiture of his property. *Wood v. Lovett*, supra, 313 U.S. at page 371, 61 S.Ct. at page 987, 85 L.Ed. 1404; *League v. Texas*, supra, 184 U.S. at page 158, 22 S.Ct. at page 476, 46 L.Ed. 478; and see *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

Sections 3571-3578 of the Revenue & Taxation Code are in accord with these principles. They do not arbitrarily deprive the delinquent taxpayer of his remaining interest in his property but afford him adequate notice that his rights will be terminated if he does not cure his default

within a period which affords him a fair opportunity to prevent the forfeiture. This is all that the Constitution requires in this regard.

I am not, however, convinced that the new legislation has improved the delinquent taxpayer's position or conferred upon him benefits equally as advantageous as those existing under the prior procedure. To me, the declaration of Mr. Justice Traynor in this regard is patently inconsistent with his statement that the new policy embodies a plan to classify and rehabilitate tax-deeded property by expediting the restoration of real property to the tax rolls through the termination of the theretofore continuing right of redemption. Whether a change from a conditional right of redemption which might continue indefinitely and, in any event, may not be terminated until after 21 days' notice is less desirable than an unconditional right to redeem within one year from the date the 1941 legislation became effective, is a question upon which reasonable minds may differ. I therefore place my concurrence in the judgment upon the sole ground that the new procedure is a reasonable regulation of the method for collection of taxes by the state.

CARTER, Justice (concurring).

The question presented for consideration is whether section 3574 of the Revenue and Taxation Code, adopted by the Legislature in 1941, imposes more onerous conditions upon the right to redeem property from a delinquent tax sale made prior to the adoption of such section, and if so, did the Legislature have the power to impose such conditions so as to affect the right of redemption of property covered by such prior sales?

In my opinion, said section does impose more onerous conditions on the right of redemption, as it purports to limit the time within which redemption may be made to a period of four months after notice instead of permitting the owner to exercise the right of redemption at any time until the property is sold by the state to a third person. Such being the case, I shall proceed with the consideration of the question as to whether or not the Legislature had the power to impose such conditions so as to affect tax sales made prior to the adoption of such section.

This court has held in numerous cases, and it appears to be in agreement with the weight of authority, that the general



relationship of sovereign and taxpayer is not founded on, nor does it create, any contractual rights; and the obligation of the citizen to pay taxes is purely of statutory creation, and taxes can be levied, assessed and collected only in the method provided by express statute. *Southern Service Co., Ltd., v. Los Angeles County*, 15 Cal.2d 1, 11, 97 P.2d 963; *Perry v. Washburn*, 20 Cal. 318; *Spurrier v. Neumiller*, 37 Cal.App. 683, 174 P. 338. It has also been held by this court that the power of taxation is not founded upon consent or agreement but, rather, that tax proceedings are in invitum, and has given that as its reason why all tax proceedings should be strictly construed. Judge Cooley in his work on taxation points out that as between the owner of property and the sovereign power imposing the tax there is no relationship based upon contract and that as to the owner, "the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion." *Cooley on Taxation*, vol. 4, 4th ed., sec. 1561, p. 3068.

Section 327 of the Political Code reads as follows: "Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal."

It appears to be well settled in this state that the right of recovery upon a purely statutory right can be impaired or abrogated without violation of any right guaranteed by the state or federal Constitutions. *Southern Service Co., Ltd., v. Los Angeles County*, supra; *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 74 P.2d 252; *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; *Berg v. Traeger*, 210 Cal. 323, 292 P. 495; *Callet v. Alioto*, 210 Cal. 65, 290 P. 438; *Moss v. Smith*, 171 Cal. 777, 155 P. 90; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, Ann.Cas. 1912B, 1148, 37 L.R.A., N.S., 934; *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 P. 322.

The rule established by these cases is clearly stated by this court in the case of *Krause v. Rarity*, supra, 210 Cal. at page 652, 293 P. at page 65, 77 A.L.R. 1327, as follows: "The defendant Rarity contends that, by reason of the enactment of the foregoing statute, the cause of action of the plaintiffs has been wiped out, that section 377 of the Code of Civil Procedure and section 2096 of the Civil Code have been

repealed in whole or in part by the enactment of section 141¾ of the California Vehicle Act, and that the rule of law to be applied is laid down in such cases as *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, Ann.Cas. 1912B, 1148, 37 L.R.A., N.S., 934; *Willcox v. Edwards*, 162 Cal. 455, 123 P. 276, Ann.Cas. 1913C, 1392; *Moss v. Smith*, 171 Cal. 777, 155 P. 90; *Freeman v. Glenn County Tel. Co.*, 184 Cal. 508, 194 P. 705, and *Chenoweth v. Chambers*, 33 Cal. App. 104, 164 P. 428. By those cases the rule obtaining elsewhere has become thoroughly established in the law of this state that, when a right of action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right, unless the right has been reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in pending litigation. In the case at bar the cause of action depended solely on the statute. There is no saving clause, and the action is still pending."

In the case of *Napa State Hospital v. Flaherty*, supra, 134 Cal. at page 317, 66 P. at page 323, the rule is thus stated: "It is a rule of almost universal application that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy, unless the appealing statute contains a saving clause."

It appears to be a rule of universal acceptance that the clause of the federal Constitution and those of the several state Constitutions prohibiting the impairment of obligations of contracts runs only to conventional contracts created by the mutual consent of the parties and not to quasi-contractual obligations imposed by the law and without procuring the consent of the party to be charged. *State of Louisiana v. Mayor of New Orleans*, 109 U.S. 285, 3 S.Ct. 211, 27 L.Ed. 936; *Freeland v. Williams*, 131 U.S. 405, 9 S.Ct. 763, 33 L.Ed. 193; *Garrison v. City of New York*, 21 Wall. 196, at page 203, 22 L.Ed. 612; *Crane v. Hahlo*, 258 U.S. 142, 146, 42 S.Ct. 214, 66 L.Ed. 514, 517; *Read v. Mississippi County*, 69 Ark. 365, 63 S.W. 807, 86 Am. St.Rep. 202, affirmed 188 U.S. 739, 23 S.Ct. 849, 47 L.Ed. 677; *State v. New Orleans*, 38 La. Ann. 119, 58 Am.Rep. 168; *Love v. Cavett*, 26 Okl. 179, 109 P. 553; *Nottage v. City of Portland*, 35 Or. 539, 58 P. 883, 76 Am.St.Rep. 513; *Anders v. Nicholson*, 111

Fla. 849, 150 So. 639; *State v. Smith*, 58 S.D. 22, 234 N.W. 764.

I am persuaded by the reasoning contained in the foregoing authorities that the tax liability of the owner of property is not predicated upon contract; that it is wholly of statutory creation and all rights and privileges granted to the property owner in connection therewith, including the enforcement of such rights, are founded upon statutory enactment, and such rights may be limited or entirely abrogated by the Legislature without violating constitutional provisions prohibiting the impairment of obligations of contracts.

Respondent relies most strongly upon the case of *Teralta Land & Water Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am.St. Rep. 194, in support of his contention that section 3574 of the Revenue and Taxation Act is unconstitutional as being in violation of the impairment of contracts clauses of the state and federal Constitutions. While that case contains language supporting respondent's position, it does not go as far as is necessary to support the position taken by respondent in this case. The reasoning of the *Teralta* case was based upon decisions from other states and opinions of text writers dealing with the rights of purchasers from the state of tax-deeded lands. There can be no question but that such transactions rested upon contract and the rights of the purchasers therein were contractual and vested under ordinary common-law principles. The rule announced in the *Teralta* case is thoroughly sound, but was not applicable to the set of facts then before the court. The difference between sales to the state and sales to individuals has been discussed by this court in the case of *Anglo California Nat. Bank v. Leland*, 9 Cal.2d 347, 70 P.2d 937. But such distinction was not drawn in the *Teralta* case. An examination of the authorities relied upon in the *Teralta* case discloses that they do not support a rule applicable to the facts of that case. The decisions from other states are cited without any statement of facts, and with only one quotation from the cases and, hence, their inapplicability to the particular facts then before this court is not apparent until such cases are read and analyzed. The cases of *Merrill v. Dearing*, 32 Minn. 479, 21 N.W. 721; *Robinson v. Howe*, 13 Wis. 341 (cited in the opinion as 13 Wis. 380), *Conway v. Cable*, 37 Ill. 82, 87 Am.Dec. 240, and *Wolfe v. Henderson*, 28 Ark. 304, all

involved situations where the property was conveyed by tax deed to an individual rather than to a state. In addition, the *Wisconsin* case involved an extension of time to redeem rather than a shortening of the period, and the *Arkansas* case actually turned upon a question of statutory construction. The other *Minnesota* case, *Goenen v. Schroeder*, 8 Gil. 344 (cited in the opinion as 8 Minn. 387), did not involve a tax deed at all but involved a mortgage. The *Iowa* case, *Negus v. Yancey*, 22 Iowa 57, not only fails to support the *Teralta* case but holds quite to the contrary. True, the last cited case holds that the law in effect at the time of the sale controls, but the problem before the court did not involve a change in the law after the sale but a change in the law before the sale, and the question was whether the law at the time taxes accrue or the law in effect at the time of the sale should control. The court held that the redemptioner was bound by the change in the law, \* \* \* the reason given, 22 Iowa at page 59 of the opinion, being, "He (the redemptioner) has no vested rights or privileges in the terms or provisions of the law under which he is a defaulter."

The case of *Moody v. Hoskins*, 64 Miss. 468, 1 So. 622, involved a situation where the right of redemption was terminated instantly by the repeal of a redemption statute without allowing a reasonable time, or any time, for the taxpayer to save his property. The court, without any citation of authority and relying only upon the injustice of such a statute, held it to be invalid. The other *Mississippi* case, *Caruthers v. McLaran*, 56 Miss. 371, involved only a question of statutory construction.

Thus we find that not one of the cases cited supports the conclusion reached in the *Teralta* case, but, to the extent that they are applicable at all, go no further than to hold that where a tax sale is made to a private party, contractual and vested rights arise. And one case, not involving a deed to an individual, expressly held that the redemptioner was bound by the change in the law. *Negus v. Yancey*, supra.

It is quite apparent, therefore, that the line of decisions represented by the *Teralta* case resulted from a failure to distinguish between sales to the state and sales to private parties, and that the distinction noted by this court in the *Anglo California National Bank* case requires the overruling of the *Teralta* case.

The precise problem involved in this case was recently considered by the Supreme Court of Michigan. *Baker v. State Land Office Board*, 1940, 294 Mich. 587, 293 N.W. 763. In that case the court said at page 767 of 293 N.W.: "Nor is Act No. 206, Pub. Acts 1893, as amended, unconstitutional as an ex post facto law, impairing the obligation of contract, as claimed by petitioner. Under the express provisions of the general property tax law of 1893, as amended by Act No. 325, Pub. Acts 1937, title to all lands within the borders of the State that had been sold and bid in by the State became vested in the State upon expiration of the 18-month period of redemption. It is contended that prior to the amending act the period of redemption was five years; that such an amendment, cutting off title of the owners in a lesser period of time, cannot apply retrospectively to taxes levied before the amendment. Counsel apparently refers to 1 Comp.Laws 1929, § 3520, as amended by Act No. 250, Pub. Acts 1933, which requires that lands be delinquent in taxes for a period of five years before the State can acquire title. The right of redemption, however, is not a constitutional right, but exists only as permitted by statute. *Keely v. Sanders*, 99 U.S. 441, 25 L.Ed. 327; *Dumphy v. Hilton*, 121 Mich. 315, 80 N.W. 1. Laws of retroactive character, affecting tax liens which attached prior to such an enactment, are not unconstitutional. *City of Detroit v. Safety Investment Corp.*, 288 Mich. 511, 285 N.W. 42; and statutes affecting such liens, shortening the time previously fixed for sale or redemption, affect only a remedy for the delinquency of the taxpayer and do not impair contract obligations or vested rights. See *Muirhead v. Sands*, 111 Mich. 487, 69 N.W. 826; *Board of Supervisors v. Hubinger*, 137 Mich. 72, 100 N.W. 261, 4 Ann.Cas. 792; *Harsha v. City of Detroit*, 261 Mich. 586, 246 N.W. 849, 90 A.L.R. 853."

In conclusion, and to summarize the views expressed in the foregoing opinion, the relationship of sovereign and taxpayer is purely statutory and is not founded on contract, and the Legislature has the power at its discretion to change the mode or method of assessing, levying and collecting taxes, including the termination of the owner's right of redemption from delinquent tax sales; that section 3574 of the Revenue and Taxation Code does not constitute a violation of any constitutional provision and is a valid exercise of the legislative power; that the case of *Teralta Land & Water*

*Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am.St.Rep. 194, and any other cases in this state which purport to follow the erroneous doctrine announced in that case should be overruled, and that petitioner is entitled to the writ of mandate prayed for in its petition in this case.

SHENK, Justice (dissenting).

I dissent. In my opinion the legislation under consideration provides for a shortening of the period of redemption fixed by the law in force at the time of the sale for delinquent taxes. The question whether the shortening of that period is a substantial impairment of the redemptioner's right cannot be answered by the citation of cases which declare that the Legislature may change the method of redemption. It is not the method, but the period of redemption which is involved. Neither may it properly be said that the right of the redemptioner is amplified because he is given more notice when his period of redemption is terminated by public declaration than when it is terminated by sale to a third person. Such a pronouncement assumes the point in issue, namely, that the redemptioner's right may be cut off at an earlier time than that provided by the law in force at the time of the sale to the state.

The case of *South San Joaquin Irrigation District v. Neumiller*, 2 Cal.2d 485, 42 P.2d 64, relied on by the majority, involved only the question whether the state could dispose of its tax-deeded lands at private sale for cash or on credit. The decision in that case was that the redemptioner had no right to the disposition by the state of its tax-deeded lands in any particular way when his right of redemption was not adversely affected. This court there expressly recognized that the question of the legislative power to shorten the period of redemption was not involved.

The rule that the law in force at the time of the sale for delinquent taxes governs the right of redemption and that the shortening of the period of redemption is a substantial impairment of that right has been the law of this state from an early period. It became and has remained a rule of property. Tax deeds have been voided for failure to comply with it, and real property titles have been adjusted on the strength of it. The cases are legion on the subject, a few of which are the following: *Teralta Land, etc., Co., v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am.St.Rep. 194; *Collier v.*



Shaffer, 137 Cal. 319, 321, 70 P. 177; Johnson v. Taylor, 150 Cal. 201, 88 P. 903, 10 L.R.A.,N.S., 818, 119 Am.St.Rep. 181; Biaggi v. Ramont, 189 Cal. 675, 209 P. 892; San Diego County v. Childs, 217 Cal. 109, 17 P.2d 734; Risso v. Crooks, 217 Cal. 219, 17 P.2d 1001; Los Angeles County v. Rockhold, 3 Cal.2d 192, 203-205, 44 P.2d 340, 100 A.L.R. 149; King v. Samuel, 7 Cal.App. 55, 93 P. 391; Wetherbee v. Johnston, 10 Cal.App. 264, 101 P. 802; Main v. Thornton, 20 Cal.App. 194, 128 P. 766.

The peremptory writ should be denied.

CURTIS, J., concurred.



59 Cal.App.2d 411

**HATCH v. DRAPER et al.**  
Civ. 14061.

District Court of Appeal, Second District,  
Division 1, California.  
June 26, 1943.

**I. Malicious prosecution** ☞49

A complaint failing to allege that indictment procured by defendants against plaintiff was procured by fraud or perjured testimony stated no cause of action for malicious prosecution.

**2. Pleading** ☞428(6)

**Trial** ☞178

Objections to testimony on ground that complaint failed to state cause of action and motion for judgment on the same ground were required to be decided on complaint alone, without regard to answer.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Edward E. Hatch against A. M. Draper and others for malicious prose-

cution. From a judgment dismissing the complaint, plaintiff appeals.

Affirmed.

Leonard Wilson, of Los Angeles, for appellant.

Bodkin, Breslin & Luddy and Michael G. Luddy, all of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Appeal from judgment dismissing plaintiff's complaint after objection to testimony on the ground that the complaint failed to state a cause of action. The objection was sustained and the plaintiff was given ten days to amend. Upon failure to amend and after notice thereof, the judgment ordered the complaint dismissed, that plaintiff take nothing thereby and that defendants recover their costs.

[1] The complaint was for damages for malicious prosecution, and alleged a grand jury indictment procured by defendants against plaintiff, but failed to allege that the indictment was procured by fraud or perjured testimony. Therefore, on its face, the complaint failed to state a cause of action. Norton v. John M. C. Marble Company, 30 Cal.App.2d 451, 86 P.2d 892.

Appellant recognizes the sufficiency of the authorities to sustain the ruling of the trial court that the complaint did not state a cause of action, but contends that the complaint was aided by answers filed by the several defendants, and that the objection to testimony and the motion to dismiss should have been considered and determined upon all the pleadings.

[2] In such cases as this, the complaint is not aided by the answer; the trial court is limited to the allegations of the complaint; and objections to testimony and the motion for judgment must be decided upon the complaint alone, without regard to allegations contained in the answer. Bradley Company v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194; Union Flower Market v. Southern California Flower Market, 10 Cal. 2d 671, 76 P.2d 503.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

**SHEALOR v. CITY OF LODI et al.\***

**Civ. 12438.**

**District Court of Appeal, First District,  
Division 2, California.**

**June 24, 1943.**

**Hearing Granted Aug. 19, 1943.**

**1. Mandamus ⇨168(4)**

Evidence supported finding that there were sufficient funds available to pay pension required by statute to retired police officer. Gen.Laws 1937, Act 6012, §§ 3, 12.

**2. Municipal corporations ⇨187**

The failure of any city official to follow the terms of the Pension Act could not affect rights of police officer entitled to be retired on a pension. Gen.Laws 1937, Act 6012, §§ 3, 12.

**3. Statutes ⇨227**

When a statute concerns the public interest, or the rights of named parties, it will be held to be "mandatory" unless the language in plain terms discloses the legislative intent to make it discretionary.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Statute".

**4. Statutes ⇨227**

Where public interest or private rights call for the exercise of the power vested in a public official by statute, the language used, though permissive or directory in form, is in fact "mandatory".

**5. Municipal corporations ⇨187**

That statutes amending Municipal Corporation Act. and empowering cities to establish a pension system for city employees generally, were purely permissive, was not a legislative declaration that provisions for police officer's pension enacted as part of the act fifty years earlier were not "mandatory" in character. Gen.Laws 1937, Act 6012; Gen.Laws Supp.1939, Act 5233, §§ 764.1, 862.26.

**6. Statutes ⇨215**

Where legislative intent is at issue, the conditions existent at time legislation was enacted are determinative.

Action by F. Shealor against City of Lodi and others for writ of mandate to require defendants to retire petitioner from active service as a police officer upon a pension under statute. From a judgment ordering the writ, defendants appeal.

Affirmed.

Glenn West, of Lodi, for appellants.

Chester E. Watson, of Stockton, for respondent.

NOURSE, Presiding Justice.

The petitioner prayed for a writ of mandate to require respondents to retire him from active service as a police officer upon a pension pursuant to the Act of 1889, Stats. 1889, p. 56, Deering's Gen. Laws 1937, Act No. 6012. Following a trial the writ was ordered, and the respondents appeal. We will refer to the parties as they were designated in the trial court.

The real issue involved is whether the statute is mandatory or permissive, but the respondents also contend that there was an insufficient showing of funds available to pay the pension. It is conceded that, if the Act is mandatory, the petitioner possesses all the qualifications for retirement upon a pension. The title of the Act is "An act to create a police relief \* \* \* pension fund in the several counties \* \* \* cities, and towns of the state." Section 1 creates a "Board of Police Pension Fund Commissioners", unless within the county or city there is already a board of police commissioners, in which event such board shall constitute the board provided for in the Act. The duties of this board and the right of police officers to receive a pension are specified, and section 12 outlines the method for the creation and maintenance of the fund out of which payments of such pensions are directed to be made. An examination of the Act discloses numerous instances where the intention of the legislature to make its provisions mandatory is evidenced. In section one it is provided that the designated officials "are hereby constituted a board of trustees of the police relief or pension fund." Section two provides: "They shall organize as such board by choosing one of their number as chairman \* \* \*." Section three provides that when a member of the police force having performed the required length of service and reached the age of sixty years, applies for retire-

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Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

\* Subsequent opinion 145 P.2d 574.

ment on a pension the "board shall \* \* \* order and direct" that the applicant be retired from active service and thereafter be paid the pension provided for in the Act. Section four contains the only permissive language, permitting the board to retire a member of the force on account of physical disability. Section six provides that, when a member of the force loses his life in the performance of his duties, the board "shall order and direct" that a pension be paid to the widow. Section ten provides that the board "shall hold quarterly meetings." Section eleven confers upon the board power to summon witnesses, and to make rules in conformity with the Act. Section twelve provides that the governing board of any county, city, or town "shall \* \* \* direct the payment annually" into the pension fund, for the purposes of said fund, nine different items of revenue.

It will be thus seen that the board of trustees of the fund was "created" by the Act; its powers and duties were all prescribed therein, and that nothing was left to be done by the governing body of the county or municipality except to levy the tax prescribed therein and make other specified payments to the fund. It is argued that the discretion given to the governing authority to direct "not less than \* \* \*, nor more than" certain percentages of moneys received from certain sources makes the entire Act directory. We are not impressed with the argument because the petitioner's right does not depend upon those sources. This action is against the board of trustees of the pension fund, and not against the city council. If the council has failed to perform its duty under the Act that might be the subject of another action.

[1,2] But the petitioner is concerned only with his right to retire and to receive the prescribed pension. He has shown, and the trial court so found, that there are sufficient funds to make these payments. The testimony of the city auditor and treasurer was sufficient to support this finding. True it is that, as a matter of bookkeeping, he had not segregated the amounts fixed in the statute and had not carried the fund on his books. But the legislature made the "appropriation" when it enacted the statute, and the failure of any official to follow the terms of the Act cannot affect the rights of the petitioner in this proceeding.

[3,4] Neither party has cited any authority directly bearing upon the question whether the statute is mandatory or directory. The city relies upon *Klench v. Board of Pension Fund Com'rs*, 79 Cal. App. 171, 249 P. 46, as showing that the city of Stockton adopted an ordinance accepting the provisions of the Act; from this it is argued that formal acceptance by the governing authority is necessary in every case. There is, however, no holding that such action is necessary. To the contrary, the accepted rule is that when a statute concerns the public interest, or the rights of named parties, it will be held to be mandatory unless the language in plain terms discloses the legislative intent to make it discretionary. 23 Cal.Jur. 616; *Hayes v. Los Angeles County*, 99 Cal. 74, 80, 33 P. 766; *Uhl v. Badaracco*, 199 Cal. 270, 282, 248 P. 917. In *Crawford's Statutory Construction*, p. 530, this rule is stated and supported by numerous authorities where the author says: "But if the public interest or private rights call for the exercise of the power vested in a public official, the language used, though permissive or directory in form, is in fact peremptory or mandatory, as a general rule. \* \* \* After all, the power vested in the officer is not for his benefit but for the benefit of the public or of third persons, and it must be exercised. A duty is imposed upon the officer rather than a privilege."

[5] Appellants argue that the enactment in 1939 of section 764.1 and 862.26 as amendments to the Municipal Corporation Act, Gen.Laws Supp.1939, Act 5233, should be treated as a legislative declaration that the Act of 1889 was not mandatory. These sections are purely permissive and empower the cities to establish a pension system for city employees generally. They have no relation to the special statute of 1889 which creates a pension system for police officers only. But no authority has been cited holding that the mandatory or permissive character of a statute may be determined by some other act of the legislature taken fifty years later. If the legislature had had the earlier statute in mind, and had intended to repeal or to alter its effect it would have been a simple matter to do so. But there is no inconsistency between the old and the new and both were permitted to stand in full force.



[6] When the intention of the legislature is the question at issue, the conditions existent at the time the legislation was enacted are determinative, rather than those which might influence the legislative mind at the time the judicial determination is made. This legislation was enacted in 1889 when our courts were committed to the constitutional formula that it was the function of the legislature to legislate, and of the courts to adjudicate. Reference to the decisions of that period show adherence to the rule that when the legislature declared that a certain act should be done by public officers in the interest of the public at large, or the rights of special parties, the statute was held to be mandatory.

The judgment is affirmed.

SPENCE, J., and DOOLING, Justice pro tem, concur.

whether plaintiff had right to assume that he would not be injured by moving truck was for jury.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for personal injuries by Carl R. Scott against P. E. Gallot, Jr., and others. From an order granting plaintiff a new trial, defendants appeal.

Affirmed.

Myron Harris, Wm. H. Older, and John Jewett Earle, all of Oakland, for appellant P. E. Gallot, Jr.

Appelbaum & Mitchell, of Oakland, for appellant C. E. Porter.

James R. Agee, of Oakland, and Alfred Taddeucci, of San Francisco, for respondent.

KNIGHT, Justice.

Defendants appeal from an order granting a motion for new trial, after verdict and judgment in their favor, in an action brought by plaintiff to recover damages for personal injuries. The appeals are presented by defendants on separate briefs, but all parties are agreed that the main question presented relates to the relevancy of certain evidence as to custom and practice, which the trial court ordered stricken out, and thereupon instructed the jury that it should not consider the same for any purpose in determining the issues of the case.

The accident occurred under the following circumstances: Plaintiff was employed in the plant of the Moore Dry Dock Company, and was engaged in building a dust protector, a large and heavy piece of equipment, which was being built in the boiler shop. He and two assistants were occupied in undertaking to bolt a metal strap to this device preparatory to welding. The two helpers were alongside of plaintiff holding the strap in position, and plaintiff was down on his right knee, with his leg extended behind him, bending over in order to get underneath some "I" beams which were 18- or 20 inches above the level of the floor. Plaintiff and his helpers had been in this position ten or twelve minutes when the accident occurred. The defendant Porter, an employee of the defendant Gallot, had parked a heavy delivery truck about two feet away, and it had been there about an hour while Porter unloaded from the truck a number of oxygen tanks and reloaded it



59 Cal.App.2d 421

SCOTT v. GALLOT et al.

No. 12295.

District Court of Appeal, First District,  
Division 1, California.

June 28, 1943.

Hearing Denied Aug. 26, 1943.

#### 1. Automobiles ⇨240(2), 243(4)

In action for injuries sustained when delivery truck started up in boiler shop while plaintiff's foot was underneath, evidence as to custom of giving warning before moving trucks was admissible on issue of contributory negligence, notwithstanding that truck driver did not know of custom, and notwithstanding that the custom was not pleaded by plaintiff.

#### 2. Negligence ⇨113(1)

In action for negligence, plaintiff is not required to anticipate defense of contributory negligence and plead in complaint facts negating contributory negligence.

#### 3. Automobiles ⇨245(70)

In action for injuries sustained when delivery truck started up in boiler shop while plaintiff's foot was underneath,

with empty containers. While plaintiff was in the above described position, his foot was under the body of the truck, directly ahead of and in the path of the rear wheel; and when Porter completed the reloading of the truck, he climbed into the driver's seat, started the engine, claimed he got a signal to proceed from a man standing at the shop door, and pulled forward, causing the right rear wheel to run over plaintiff's foot. Admittedly Porter did not sound his horn or give any warning of his intention to move the truck. He admitted that during the time he was unloading he saw the men working on the dust protector, but he testified that about 30 seconds previous to starting up he had observed conditions on the right side of the truck and had seen no men in the immediate vicinity thereof.

On cross-examination by defendant Gallot's counsel plaintiff testified as follows:

"Q. You knew that if the truck started up you were in a mighty dangerous spot, didn't you? A. Well, yes, if he started up I would be in a dangerous spot. \* \* \*

"The Court: Here is the point—let's take it back again: You knew when you started to work under the body of the truck that you were assuming a dangerous position? A. Well, yes.

"Q. What precautions did you take to protect yourself against that danger? A. I believe in the—the way I could answer that question is that the—as a rule, they always notify the men before they pull out, some way or another.

"Mr. Harris [counsel for defendant Gallot]: Q. The question was, what did you do toward your own safety, sir, to protect yourself, if anything?

"The Court: He has answered the question. He said, in effect, he assumed he would get a warning before the truck would move. He didn't do anything else. \* \* \* A. That is right."

During the same cross-examination plaintiff's counsel in the course of an objection to a question put to plaintiff by Gallot's attorney said: "He testified that he assumed he would get a warning, that was the custom and practice." Later, on cross-examination by defendant Porter's attorney, plaintiff testified as follows:

"Q. Now, you said that you usually expected a warning, that there was a warning custom of some kind. Was that a

warning by horn or what? A. Well, it was a warning by a horn or by the truck driver. \* \* \*

"The Court: Had Mr. Porter ever warned you before the accident \* \* \* A. Yes \* \* \*

"Mr. Mitchell [counsel for defendant Porter]: Q. Had other people warned you too? A. Yes.

"Q. Other truck drivers? A. Other truck drivers had warned me.

"Q. You had been warned on many occasions? A. Oh, many times when we were working around they would come along and say, 'Will you please move out of the way now, we are going.' \* \* \*

"Q. A month and a half before this accident you say that Mr. Porter warned you to look out? A. Yes \* \* \*.

"Q. What was that occasion? Tell us about it. A. I was standing in his road that day talking to another fellow and I was in his way.

"Q. He was pulling out? A. Yes, he was ready to leave there.

"Q. Did he sound the horn? A. No. He came around in front of the truck and said, 'Out of the way, please, I am going out.' \* \* \*

"Q. Any other occasion when Mr. Porter had to warn you to get out of the way? A. Not that I remember of, that one time was all."

On redirect examination of plaintiff the following occurred:

"Q. Now, as I understand, the custom and practice of all these trucks coming in here would be that if they were moved in any way—there wouldn't be—as close to the men, they wouldn't be—I am talking about the custom and practice—was that those truck drivers warned you before making any move with those trucks, is that right? A. Yes.

"Mr. Harris: I object to that as leading and suggestive and immaterial and ask that the answer go out.

"The Court: Overruled. Reframe your question.

"Mr. Agee [plaintiff's counsel]: In other words, bluntly, Mr. Scott, the custom and practice of the truck drivers who came in and out of the shop where you were working was to warn you before they moved?

"Mr. Harris: The same objection. A. Yes.

"The Court: The answer may stand."

Thereafter testimony as to the custom of giving warning was also given by two other witnesses for plaintiff, Kiado and Dutrow, to which defendants' attorneys objected on the ground that the questions were immaterial and no proper foundation had been laid; and the objections were overruled. Toward the end of the trial a motion was made by defendant Porter's counsel to strike out the testimony of plaintiff, Kiado and Dutrow, given with regard to any custom or practice on the premises; and the court granted the motion and instructed the jury that the testimony so stricken out was not to be considered by them for any purpose.

[1] It is plaintiff's contention that the stricken evidence became relevant under the affirmative issue of contributory negligence raised by the answer to the complaint, and that therefore the trial court was justified in granting a new trial on that ground. We agree with this contention. The case of *Burke v. John E. Marshall, Inc.*, 42 Cal.App.2d 195, 108 P.2d 738, 743, (hearing denied by Supreme Court) is in our opinion determinative of the question. There the plaintiff was employed as a stevedore to help discharge a cargo of lumber from a steamship which was alongside a dock. The dock was in the possession and under the control of the defendant, and the ship was owned by the plaintiff's employer. A lumber carrier, a four-wheeled vehicle which can be driven over a pile of lumber, pick it up and transport it elsewhere, struck plaintiff while plaintiff was engaged in his duties. The driver of the carrier testified that he blew his horn continuously until he reached a point about 8 or 10 feet from the load of lumber, where plaintiff was working, but plaintiff testified that he heard no warning of the carrier's approach until one wheel was on top of his foot. During the course of the trial plaintiff was permitted to testify over objection that during his eight years of work on the docks as a stevedore it was the custom of the operators to blow the horn of the lumber carriers when they were about 25 feet away from any men working on the dock. The reviewing court held: "The contention of defendants that the court committed prejudicial error in permitting such testimony as to custom cannot be sustained. Where the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence

of the ordinary practice and custom which is generally followed in the performance of such act under the same or similar circumstances is competent. *Thomas v. Southern Pac. Co.*, 116 Cal.App. 126, 2 P.2d 544; *Hennesey v. Bingham*, 125 Cal. 627, 58 P. 200." The case of *Mace v. Watanabe*, 31 Cal.App.2d 321, 87 P.2d 893, holds to the same effect.

Defendants contend that it is only in cases where there are contractual relations between the plaintiff and defendant or a master and servant relationship involving the doctrine of assumption of risk that evidence of custom and practice is admissible, citing *Phoenix Assur. Co. v. Texas Holding Co.*, 81 Cal.App. 61, 252 P. 1082, and *Carroll v. Central Counties Gas Co.*, 96 Cal.App. 161, 273 P. 875, 274 P. 594, in support of this contention. However, those cases are not in point here. They hold in effect that where such relationships do not exist evidence on the part of a defendant as to specific negligent practices of others cannot be admitted as showing an excuse for the negligent act of the defendant; in other words, they hold that in cases not involving those relationships the fact that others are in the habit of acting in the same negligent manner will not excuse a defendant's negligence—that if the doing of the thing is inherently negligent then it remains negligent despite the custom and practice of others to do the same thing. It is quite obvious, therefore, that those rules have no application to the present case, for here the plaintiff in refutation of the charge of contributory negligence relied on a custom which was a safety measure, not a custom which was negligent. Nor has the rule upon which plaintiff relies been limited to cases involving contractual relations or master and servant or assumption of risk, for neither *Burke v. John E. Marshall, Inc.*, supra, nor *Mace v. Watanabe*, supra, wherein evidence of custom was held admissible, were such cases.

Defendants also cite the case of *Milton v. Los Angeles Motor Coach Co.*, 53 Cal. App.2d 566, 128 P.2d 178, 180; but a mere glance at the factual situation there demonstrates that it is so entirely different from the one presented here as to be in no way here controlling. There a photographer was struck by a motor coach. It was at night time, during the month of December. He was standing out in Wilshire Boulevard, in Beverly Hills, "a busy, congested traffic artery," with a black hood over his



head, behind his camera, which rested on a tripod and was trained on a store window; and over defendants' objections he was permitted to introduce evidence that it was customary for photographers to stand in the street. The judgment in his favor was reversed, and as to such evidence the court said: in part: "Even though it might be proper in some situations to show the existence of customary practices or conditions which were known to the parties or were of such notoriety as to be presumptively within their knowledge and the existence of which would reasonably have influenced their conduct, we have no such situation here nor anything approaching it."

Nor were defendants entitled to have the testimony stricken out because defendant Porter, the driver of the truck, testified that he had no knowledge that it was the custom and practice in the Moore Dry Dock plant to give warning of the starting of trucks; for as shown by the record plaintiff did not rely upon a breach of custom to establish Porter's negligence. In this regard the record shows that Porter had been in this same shop "hundreds of times" before the accident; that he drove in regularly to make deliveries at least once or twice a week; and the theory of plaintiff's case was that Porter was guilty of negligence, not because of any breach of custom, but because he jumped into the parked truck which had been standing there an hour or so, and started off without giving any warning of any kind, after having seen plaintiff and others working in close proximity to the truck. Therefore, so far as the issue of contributory negligence was concerned, it was immaterial whether or not Porter had knowledge of the asserted custom.

[2] Defendants make the further point that the stricken testimony was inadmissible because plaintiff did not plead custom or usage. The point is without merit. As shown by the case cited and relied upon by defendants (*Tharp v. San Joaquin Cotton Oil Co.*, 27 Cal.App.2d 554, 81 P.2d 443, 82 P.2d 21), the rule contended for by defendants had reference to cases where the plaintiff's cause of action against the defendant is based upon the theory that defendant has violated some particular custom or usage. And it may be that such rule may be invoked also in a proper case by a plaintiff against a defendant whose defense of contributory negligence is based upon the theory that plaintiff has violated

some particular custom or usage. But neither of those situations are here involved. Stated another way, when a plaintiff files his complaint charging defendant with negligence he is not required to anticipate that the defense will be contributory negligence, and to plead facts to negative such charge.

[3] In further support of the trial court's order granting a new trial plaintiff contends that the defendants proposed and the court gave an erroneous instruction. It contained the statement that "the plaintiff could not assume or act or rely on the assumption that he would not be injured by a moving truck." This same form of instruction has been before the reviewing courts on two previous occasions, first in the case of *Warnke v. Griffith Co.*, 133 Cal. App. 481, 24 P.2d 192, and again in the case of *Clarke v. Volpa Brothers*, 51 Cal. App.2d 173, 124 P.2d 377. In the former it was held that under the undisputed facts of that case the instruction was not erroneous and the judgment was affirmed; whereas in the latter case it was held that the instruction was improper where, as in that case, the facts are in dispute as to whether the plaintiff did or did not have a right to assume that trucks would not be moving at the place where he received his injuries. In so holding the court said that in that state of the evidence the giving of the instruction in the form given in the *Warnke* case was an invasion of the province of the jury. It is our opinion that in the present case the question of whether or not plaintiff had the right to assume, act or rely upon the assumption that he would not be injured by the moving truck was one of fact for the determination of the jury, and that therefore if on retrial a similar instruction is offered, its wording should be modified accordingly.

In view of the conclusion reached on the question of the admissibility of the testimony as to custom and usage, the remaining points urged in connection therewith become unimportant. Furthermore, it may be well to state that nothing that has been said herein should be construed as holding or indicating that any of the parties here involved were or were not negligent. Those are pure questions of fact to be determined in the trial court on the retrial of the action.

The order granting the new trial is affirmed.

PETERS, P. J., and WARD, J., concur.

59 Cal.App.2d 233

**MAGNUSON v. MARKET ST. RY. CO. et al.**  
**No. 12318.**District Court of Appeal, First District,  
Division 1, California.  
June 17, 1943.

suburban area before driving blindly into the path of the car to make a "U" turn, "last clear chance" doctrine was not applicable in favor of motorist notwithstanding that he may have given an arm signal before making the turn.

**1. Railroads** ⇨324(1)

As much care is required of a person crossing the tracks of an electric railway upon a private right of way in the open country as is required of a person crossing the tracks of a steam railway.

**2. Railroads** ⇨327(1), 333(1)

Where the physical facts shown by the undisputed evidence raise the inevitable inference that person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which was plainly open to his view, he is, as a matter of law, guilty of contributory negligence.

**3. Negligence** ⇨83

In determining whether "last clear chance" doctrine is applicable, the test is whether, when both parties have been negligent, plaintiff has ceased to have the power to prevent the accident and defendant may still do so by ordinary care, and the doctrine is not intended to protect a plaintiff from what amounts to suicidal recklessness.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

**4. Negligence** ⇨83

The "last clear chance" doctrine is inapplicable where injured person could have avoided accident up to very moment thereof by ordinary care.

**5. Negligence** ⇨83

One able to escape danger by ordinary care after becoming aware thereof but neglecting to do so cannot invoke last clear chance doctrine to place burden of resulting loss on defendant in former's action for damages.

**6. Railroads** ⇨338

Where motorist who could have stopped his automobile within some three feet saw street car approaching at some 45 miles per hour in the same direction on street railway's private right of way in a

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by August Magnuson against Market Street Railway Company, and another for injuries sustained in an automobile accident. From a judgment for defendants, plaintiff appeals.

Affirmed.

Philander B. Beadle and Samuel Vartan, both of San Francisco, for appellant.

Cyril Appel, Ivores R. Dains, George Liebermann, and George E. Baglin, all of San Francisco, for respondent.

KNIGHT, Justice.

This action for damages arose out of a collision between a street car operated by the defendant company and a Ford coupe owned and driven by plaintiff. The motor-man was joined as party defendant with the railway company, and they answered, denying plaintiff's allegations of negligence and alleging that the collision was proximately caused by plaintiff's carelessness and negligence, and that said carelessness and negligence proximately contributed thereto. The cause was tried by a jury, a verdict was returned in favor of defendants, and plaintiff appeals.

The accident occurred on a clear day during the noon hour on May 11, 1941, at the El Mirasol Place intersection of Sloat Boulevard in the suburban area of San Francisco, when plaintiff attempted to make a "U" turn in front of the street car, which was travelling in the same direction over the railway company's private right of way. The admitted facts show that plaintiff saw the approaching street car prior to and at the time he started to make the "U" turn in front of it, but failed to note the speed it was travelling; that he could have stopped his coupe within three feet at any time before reaching the track; and that notwithstanding he was fully aware of the oncoming car and could have avoided being struck by merely stopping his car he drove blindly into the pathway thereof. The

street car weighed 28 tons, and shoved the coupe along the track for a short distance, but did not overturn it. As the result of the collision the coupe was damaged to the extent of \$135 and plaintiff was injured. He suffered no cuts or lacerations, and was able to drive his coupe home, but it was afterwards ascertained that four ribs had been fractured and he sustained a shoulder injury.

Plaintiff concedes that the evidence sustains the implied finding of the jury that he was guilty of negligence, but he contends as sole ground for reversal that the trial court erred in refusing to instruct the jury at his request upon the doctrine of the last clear chance. There is no merit in the appeal. The factual situation is identical in all material respects with those considered in *New York L. Oil Co. v. United Railroads*, 191 Cal. 96, 215 P. 72, and *Rasmussen v. Fresno Traction Co.*, 15 Cal. App.2d 356, 59 P.2d 617, wherein it was held that the doctrine of the last clear chance was not applicable, and the judgments in favor of the plaintiffs were reversed. Manifestly the law as laid down in those cases and by the authorities cited therein is determinative of the contentions made by plaintiff in furtherance of the present appeal.

Stated in greater detail, the essential facts of the present case are these: Sloat Boulevard is a long, straight main highway running westerly from Portola Drive to the Ocean Beach, on a slight down grade, and is divided down the center by the private right of way of the defendant company, over and along which are laid its double tracks. Palos Place and El Mirasol Place are intersecting streets from the north. They are about 200 or 250 feet apart, and cross the right of way, but do not extend beyond the south boundary of the boulevard. The boulevard is paved on both sides of the right of way and each side is divided into three vehicular traffic lanes, the north side being used for westbound traffic and the south side for eastbound traffic. The crossing over the right of way at the end of El Mirasol Place is paved, but the right of way is not. It is covered with ties, rock and gravel, and the level of the rails is slightly above the surrounding surface. The view to the east and to the west of the crossing is unobstructed for several thousand feet, and under the provisions of a municipal ordinance the street cars are permitted to travel 45

miles an hour over and along the private right of way.

As the street car and the coupe travelled westerly toward the Ocean Beach the coupe was ahead of the street car and following the traffic lane closest to the company's private right of way; and the following is the substance of plaintiff's testimony in describing the accident: He stated that upon crossing Palos Place he decided to make a "U" turn at the next intersection (El Mirasol Place) which was about 200 or 250 feet ahead, and he slowed down to 10 or 15 miles an hour; that as he slowed down he looked back and saw the approaching street car, which he estimated was about two blocks behind him, but that he did not take note of its speed; but as he drew closer to the east curb line of El Mirasol Place he gave an arm signal, reduced his speed to five or seven miles an hour, shifted into second gear, and made a left turn to cross the track; that while making the turn he looked again and saw the approaching street car, which he estimated was then about a block behind him, but that again he failed to take note of its speed. The distance from the edge of the boulevard pavement where he made the turn to the nearest rail of the westbound track was less than eight feet, and plaintiff testified that he could have stopped his coupe at any time "almost immediately" — "within a foot or two or three", but that without looking again to see how close the car was to the crossing he drove upon the westbound track; that when he was about a quarter way across the track he looked and saw the street car; that it was about 50 feet distant from him; that it was approaching the crossing at 40 or 45 miles an hour, and that he was still travelling in second gear; that the street car did not diminish its speed before the impact. The street car struck the coupe in the middle of the left side and plaintiff estimated that the street car was brought to a stop about 95 feet from the point of impact.

The motorman testified that the street car had been travelling 25 to 30 miles an hour; that when he neared the El Mirasol intersection he reduced the speed about 10 miles an hour, and that the street car was within 30 feet of the crossing when plaintiff started to make the left turn toward the track; and the evidence is undisputed that instantly upon seeing plaintiff turn off the boulevard toward the track the motorman used all available means to stop the



car; that he "slugged" it (put it in reverse), but that it was impossible to stop it before it struck the coupe. The evidence further shows that as soon as the car was "slugged" it skidded along the track and according to the motorman's testimony was brought to a stop within a car length (48 feet) beyond the point of the collision. A police officer arrived at the scene of the accident just after it happened, and he testified that plaintiff told him at that time that he did not see the street car at all before it struck him; whereas the motorman's testimony as to the circumstances leading up to the impact was fully substantiated by a passenger who was riding on the north side of the front end of the car. He stated among other things that when he saw the automobile turn suddenly off the highway into the pathway of the street car he thought "somebody committed suicide."

[1,2] Resolving whatever conflicts there may be in favor of the plaintiff, the admitted facts bring the case squarely within the legal principles applied in determining the two cases above mentioned. In each of them, as here, the plaintiff, being aware of the approach of the oncoming street car travelling on its own right of way, attempted to cross in front of it, and it was held in each case that the doctrine of the last clear chance could not be applied, because the plaintiff, having been fully aware of the oncoming street car, had the greater opportunity of avoiding injury by simply stopping his vehicle before he drove upon the track. In the New York Lubricating Oil Co. case, *supra*, the facts relating to the accident are so similar to those of the present case as to be identical. There as here the accident occurred on Sloat Boulevard. A truck attempted to cross in front of a rapidly approaching street car, after the driver of the truck had seen the street car. The judgment was for the plaintiff, and in reversing it the court said [191 Cal. 96, 215 P. 73]: "Admittedly the driver of the truck, not only could see, but actually did see, the car as it came down the descent at an excessive rate of speed. And if he could, as the evidence shows without contradiction, have stopped his truck at any time prior to the collision within a distance of 3 feet, then surely his failure to do so under the shown circumstances of an obvious and imminent danger was a failure to exercise that ordinary care which a reasonably prudent

man is required by the law to exercise in such a situation. \* \* \* The rule with reference to the duty of a person approaching a railroad track is equally applicable to electric railroads which are being operated under conditions similar to those under which steam railroads are ordinarily operated. That is to say, as much care and caution is required of a person crossing the tracks of an electric railway upon a private right of way in the open country as is required of a person crossing the tracks of a steam railway. *Martz v. Pacific Electric R. Co.*, *supra* [31 Cal.App. 592, 161 P. 16]; *Heitman v. Pacific Electric R. Co.*, 10 Cal.App. 397, 102 P. 15; *Simoneau v. Pacific Electric R. Co.*, 159 Cal. 494, 115 P. 320; *Phillips v. Washington, etc., R. Co.*, 104 Md. 455, 65 A. 422, 10 Ann.Cas. 334. It was the duty of the driver of the truck to note the speed at which the electric car was approaching the crossing, and if, when the driver of the truck last looked at the approaching car, it was within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, it was undoubtedly negligence on the part of the driver to attempt to make the crossing. *Martz v. Pacific Electric R. Co.*, *supra*. It is the rule in this state that, where the physical facts shown by the undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which was plainly open to his view, he is, as a matter of law, guilty of contributory negligence. *Martz v. Pacific Electric R. Co.*, *supra*; *Jones v. Southern Pacific Co.*, 34 Cal.App. 629, 168 P. 586."

And in holding that the doctrine of last clear chance had no application to the facts of the case, the court went on to say: "Conceding, however, that the motorman, while he was yet some distance from the point of collision, was aware of the approach of the truck, nevertheless it is an undisputed fact that the driver of the truck was likewise aware of the approach of the car, and that he could have brought the truck to a standstill within a distance of three feet. There was a concurrent duty, as a matter of law, upon the part of the driver of the truck to stop, if possible, before the actual collision occurred. Obviously the truck proceeding at the slow rate of speed mentioned, and with the

ability to stop within the short distance of three feet, had the greater opportunity to avoid the collision. And so long as the negligence of the driver of the truck in continuing on in his course to the point of crossing the tracks of the defendant was contemporaneous and concurrent with that of the defendant's motorman, plaintiff cannot rightfully rest its case upon the doctrine of last clear chance. *Young v. Southern Pacific Co.* [189 Cal. 746], 210 P. 259."

[3] In *Rasmussen v. Fresno Traction Co.*, supra, plaintiff was driving south on West Avenue near the city of Fresno where said avenue crossed the defendant's double track private right of way. The country was open and either vehicle could have been seen for several hundred feet. The double track right of way ran east and west and the street car with which plaintiff collided was eastbound on the south track. When plaintiff was 10 feet north of the north track he saw the street car approaching between 200 and 300 feet away. He shifted into second gear and proceeded across the north track and on to the south track at a speed of five miles an hour, at which speed he could have stopped immediately. The street car was proceeding at 30 to 35 miles an hour, and weighed 16 tons. In holding that the doctrine of last clear chance was not applicable, and that the court therefore erred in instructing the jury on that doctrine, the court said [15 Cal.App.2d 356, 59 P.2d 622]: "In such a case as this a motorman has a right to assume that the driver of the automobile will stop. His street car is heavier and cannot turn aside and he may reasonably, and naturally will, delay stopping in the belief that the other will stop or will get across the track. There is naturally a much shorter time during which it is possible for him to see and realize that the other is not going to stop and cannot get across, since the other may come very close before stopping and if he does not stop may speed up to get across. The very fact that a motorist slows down almost to a stop when about 20 feet away, as the respondent did here, is apt to lead the motorman to believe that the motorist is going to stop, and would naturally tend to delay his application of the brakes. On the other hand, the driver of the automobile not only has the duty to stop but in his lighter and quicker vehicle has much more of an opportunity to stop or to speed up. Even after the respondent failed to stop, the slightest exercise of care on his part

would have enabled him to avoid the accident by a very slight increase in speed which would have been easily possible at the rate he was going. In determining whether the doctrine of last clear chance is applicable the test is whether, when both parties have been negligent, the plaintiff has ceased to have the power to prevent the accident and the defendant may still do so by exercising ordinary care. *Darling v. Pacific Electric R. Co.*, supra [197 Cal. 702, 242 P. 703]. Applying this test here we conclude that the court erred in submitting the issue of last clear chance to the jury. \* \* \* Further, if it could be held under the evidence that the motorman had any chance to stop after he realized the danger it must inevitably be held that the respondent not only also had a chance but that he actually had a better chance to avoid the collision. When he was some 20 feet from the point of impact, he observed the on-coming car which, according to his own evidence, may have been not more than 200 feet away. Without knowing how fast the car was coming he slowed down to 5 miles an hour or less and, changing to second gear, proceeded across the tracks without stopping or increasing his speed. Under such circumstances, the theory that he was oblivious to his danger because he did not again look toward the street car cannot be invoked to show his inability to escape, and his negligence was not only continuous to the last but was the proximate cause of his injury. There was neither evidence justifying an inference that the respondent was unable to escape from his position of peril nor that the motorman had a clear opportunity to avoid the accident. The doctrine of last clear chance was never intended to protect a plaintiff from what amounts to suicidal recklessness and it should not be thus extended. Regardless of any other consideration, it fully appears that the respondent, right up to the moment of the impact, had not only a chance but the better chance to avoid the accident."

[4,5] Another case which might be cited in support of the trial court's ruling is *McHugh v. Market Street R. Co.*, 29 Cal.App.2d 737, 85 P.2d 467, 470, wherein the plaintiff attempted to cross in front of an approaching street car, and the doctrine of last clear chance was held inapplicable, the court saying: "It is quite certain, however, that under the admitted facts of the present case the doctrine of the last clear chance is not available to plaintiff, for the

reason that it has been specifically held that the doctrine has no application where by the exercise of ordinary care the plaintiff up to the very moment of the accident could have avoided it (*Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36; *Young v. Southern Pac. Co.*, 189 Cal. 746, 210 P. 259; 19 Cal. Jur. p. 658, and 8 Cal. Jur. Supp., p. 368, and cases cited therein); nor where the driver of an automobile is in no apparent peril until the very moment of the collision with the street car. *Read v. Pacific Electric R. Co.*, 185 Cal. 520, 197 P. 791. In other words, if after a plaintiff is aware of the danger, and being able to escape it by the exercise of ordinary care, he neglects so to do, he cannot invoke the last clear chance to place the burden of the resulting loss upon the other party, because obviously, if both parties to an accident could by the exercise of ordinary care have avoided it, neither can be said to have had the last clear chance. *Palmer v. Tschudy*, supra; *Arnold v. San Francisco-Oakland T. Rys.*, supra [175 Cal. 1, 164 P. 798]."

The evidence in the present case in favor of plaintiff is even much weaker than that considered in the foregoing cases, because in each of them the automobile approached the track from the intersecting street, and therefore could be seen for some distance headed directly toward the track; whereas here the automobile was travelling along a main highway parallel to the street car tracks until it abruptly turned to the left into the pathway of the street car. Moreover, in the *New York Lubricating Oil Co.* case, supra, the statement of facts shows that up to within 50 feet of the point of collision the motorman was not giving his entire attention to the track ahead of him; and that when he ultimately discovered that a collision was imminent and inevitable he abandoned his position, jumped back into the car, and did not go forward to stop the car until it was 300 or 400 feet beyond the point of collision; while here, just as soon as the motorman saw plaintiff turn off the main highway to the left toward the track he made every effort to stop the car, and it was stopped in a comparatively short distance beyond the point of collision.

Nor is the situation here altered by plaintiff's testimony (which was flatly contradicted by the motorman and the passenger) that before making the turn he gave an arm signal, for the reason that he admitted that after having given the arm signal he looked and saw the oncoming street car in

ample time to have stopped his coupe before reaching the track, but that nevertheless he drove blindly into the pathway of the car.

[6] Many other cases based on factual situations analogous to the one here presented could be cited in further support of the trial court's ruling that the doctrine of the last clear chance was not involved, among them being *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259; *Poncino v. Reid-Murdock & Co.*, 136 Cal. App. 223, 28 P.2d 932; *Arnold v. San Francisco-Oakland Terminal Rys.*, 175 Cal. 1, 164 P. 798; *Bagwill v. Pacific Electric R. Co.*, 90 Cal. App. 114, 265 P. 517; *Giannini v. Southern Pacific Co.*, 98 Cal. App. 126, 276 P. 618; and *Read v. Pacific Electric R. Co.*, 185 Cal. 520, 197 P. 791; but it would seem unnecessary to elaborate on them, for it is apparent that the decisions rendered in those cases from which the above quotations are taken are decisive of the appeal.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



59 Cal.App.2d 188

**HOGEVOLL v. HOGEVOLL.**  
Civ. 12392.

District Court of Appeal, First District,  
Division 1, California.

June 15, 1943.

Rehearing Denied July 15, 1943.

Hearing Denied Aug. 12, 1943.

**1. Husband and wife ⇨262(1)**

Where title to property acquired in 1914 was taken in name of husband and wife, presumption would be that wife took a one-half interest as her "separate property," and that the other one-half was "community property". Civ. Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property" and "Separate Property".

**2. Husband and wife ⇨49½(7)**

If payments for property title to which was taken in name of husband and wife were made with husband's separate funds, presumption would be that husband in-



tended a gift to wife of a one-half interest. Civ. Code, § 164.

### 3. Husband and wife ⇨262(1, 2)

Where both husband and wife who were living apart were present at time of foreclosure sale of property in which title was in husband and wife, a presumption would arise from commissioner's deed issued to wife alone that property was her "separate property", and burden was on husband of showing that it was not. Civ. Code, § 164.

### 4. Husband and wife ⇨262(1)

Money lent to either spouse during marriage on personal security is presumably "community property". Civ. Code, §§ 162-164.

### 5. Husband and wife ⇨254

Property purchased with money borrowed by married woman without security and repaid with community funds is deemed to be "community property", whereas that purchased with a loan on her separate property is "separate property". Civ. Code, §§ 162-164.

### 6. Husband and wife ⇨254

Where one spouse borrows money on other than credit of community, and title is taken in name of borrowing spouse but both spouses sign a mortgage or note, fact that both spouses sign mortgage or note does not make the property "community property" or overcome presumption that property is "separate property" of borrowing spouse. Civ. Code, §§ 162-164.

### 7. Husband and wife ⇨262(1)

The presumption of separate character of property standing in name of wife alone is not overcome by a showing that property was actually purchased with community funds, but in such case it will be presumed that a gift was intended, and burden is upon husband of overcoming that presumption. Civ. Code, § 164.

### 8. Husband and wife ⇨264

The statutory presumption that when title is taken in name of wife alone it is her "separate property" cannot be overcome by mere showing that property was purchased with funds secured by a loan, without further showing by husband that loan was made on credit of community property and evidence rebutting presumption of a gift to wife. Civ. Code §§ 162-164, 167.

### 9. Husband and wife ⇨264

Where both husband and wife who were living apart were present at time of foreclosure sale of property in which title was in husband and wife, and commissioner's deed was issued to wife alone, proof that wife purchased property with funds borrowed from her half-brother, without showing that loan was made on credit of community property or evidence rebutting presumption of a gift to wife, did not overcome presumption that property was wife's "separate property". Civ. Code, §§ 162-164, 167.

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Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Diana Hogevooll against S. T. Hogevooll to quiet title to parcel of realty, wherein the defendant filed a cross-complaint. From a judgment for plaintiff, the defendant appeals.

Affirmed.

S. T. Hogevooll, of San Francisco, for appellant.

Crist & Beene, of Palo Alto, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment quieting plaintiff's title to a parcel of improved real property located in San Francisco.

The parties were married in 1912. They were admittedly husband and wife at the time of trial in June of 1942, but were living separate and apart, and had been so doing for some time prior to that date. In 1932 the wife secured an interlocutory decree of divorce on the grounds of desertion, but did not secure the final decree. Later she obtained another interlocutory decree of divorce but again failed to obtain a final decree.

Upon the trial plaintiff introduced as her source of title to the property a commissioner's deed naming her as grantee and dated September 25, 1941. This deed was issued following a sale upon a mortgage foreclosure. The deed recites that a foreclosure sale was had on September 17, 1940, at which plaintiff purchased the property for \$2,800. Plaintiff testified that she obtained all of the cash used to buy the property from her half-brother; that she

had given him her unsecured promissory note for \$2,800; that the note was due a year from its date; that she had paid nothing on the note; that her half brother had not pressed her for the money; that he was willing to wait for his money until "things get settled up"; that he had assisted her financially many times in the past. The trial took place in June of 1942, so that at that time the note, although overdue, was not barred by the statute of limitations.

Defendant testified that the San Francisco property was purchased in 1914 for \$3,500; that there was a down payment of \$500, a bank mortgage of \$1,800 and a second mortgage for the balance; that the mortgages were executed by both plaintiff and defendant; that title to the property was taken in the name of the plaintiff and defendant; that all payments on the property were made from his separate funds from income from property owned by him before marriage and located in Butte, Montana. The amount of the payments, if any, made on the two mortgages does not appear. The defendant also testified that subsequent to their marriage they had acquired two blocks of lots in Menlo Park, title to which was taken in the names of both; that \$11,000 had been paid on these lots; that all such payments, as well as the payments on the San Francisco property, had been made from his separate estate, being the rents from the Montana property; that he had wanted to sell some of the Menlo Park lots to make the payments on the mortgage on the San Francisco property; that his wife refused to sell; that for this reason he could not make the payments, which resulted in the foreclosure.

This is a fair summary of all the evidence. The trial court held that the property was plaintiff's separate property and quieted her title thereto.

The exact position of defendant is not entirely clear. On this appeal it seems to be his contention that the loan secured by the wife from her half brother was community property, and that the property purchased with such loan is, as a matter of law, community property. In his original answer he alleged that the property is "community property belonging to the plaintiff and defendant in common," and again that the "property is community property and the title is in the name of plaintiff, but it has been accumulated while living together as husband and wife." In his original cross

complaint he alleged that the property "was deeded to the plaintiff and the defendant as tenants in common," and that they are still owners in common. In this pleading defendant also sought a judicial determination of the status of the Menlo Park property. After a demurrer had been sustained to the original answer and cross complaint defendant filed an amended pleading which relates only to the San Francisco property. In the amended answer he alleged that this property "belongs to and is the property of this defendant and he is the owner thereof." In the amended cross complaint he alleged that the amount paid on the purchase had been paid from his separate estate. He then alleged that his wife at the foreclosure sale purchased the property "for and in behalf of the plaintiff and the defendant as tenants in common," and that "she then and there took title \* \* \* in her own name in trust for the plaintiff and the defendant as tenants in common." It is quite apparent that defendant is confused as to whether the property is his separate property, held in common, or is community property. This same confusion of thought persists in defendant's briefs, although the emphasis there is on the contention that the real property, purchased with the loan, became, as a matter of law, community property.

[1,2] The question in this case is as to the status of the property after plaintiff purchased it at the foreclosure sale. The question of its status before that time is of importance only for the bearing it may have on the nature of the property after the foreclosure sale. When the property was acquired in 1914, since it is admitted that title was taken in the name of the husband and wife, the presumption would be that the wife took a one-half interest as her separate property, and that the other one-half was community. § 164, Civ. Code, as it read in 1914; cases collected 3 Cal. Jur.Supp. p. 564, § 68. If, as defendant sought to show, payments for the property were made with his separate funds, the presumption would be that he intended a gift to her of the one-half interest. Cases collected 3 Cal.Jur.Supp. §§ 64 and 65, p. 558 et seq. The showing of the extent to which these payments were made from his separate estate was inconclusive. If payments were thus made he had the burden of showing no intent to make a gift. Cases collected 3 Cal.Jur.Supp. p. 564, § 68. The husband made no showing on this issue at

all. The result is that, had the trial court made a finding on the status of the property before the foreclosure (findings were waived), he would have been compelled to find that presumptively the wife then owned one-half of the property as her separate property as a tenant in common, and the other one-half was owned as community property.

[3] The commissioner's deed issued after foreclosure was to the wife alone. Both the husband and wife were present at the foreclosure sale. From such a deed a presumption arises that the property is her separate property, and the burden is on the husband to show that it is not. § 164, Civ.Code. It is the position of the husband that because the wife testified she bought the property on the mortgage foreclosure sale with borrowed funds the presumption, as a matter of law, has been rebutted, and the presumption now is that the property is community.

[4, 5] The rules applicable to the status of funds borrowed by a married person are easy to state, but, like many of the other rules applicable to community property law, difficult to apply to a given set of facts. Amply supported by the authorities cited, these rules are summarized in 3 Cal.Jur. Supp. p. 535, § 47, as follows:

"The presumption that moneys borrowed during the marriage become community property has been mentioned in several of the cases. Money borrowed on personal security is certainly community property. But where money is borrowed upon the faith of the separate property of a husband or property is acquired with the proceeds of a loan on the credit of his separate property, it becomes his separate property; and the same is true even though the loan was unsecured. A personal guaranty given by a married man has been held to be a loan upon the credit of the separate property of the borrower.

"The wife's loans are treated in the same manner as the husband's. Thus money lent to the wife is presumably community property, as it is in the case where it is lent to the husband. Likewise, property purchased with money borrowed by a married woman without security and repaid with community funds is deemed to be community property; whereas that purchased with a loan on her separate property is separate property.

"Though the cases in California are clearly to the effect that in general money borrowed by the wife becomes community property, much may be said in favor of the view that since she cannot bind the community by her contracts, moneys borrowed by her should be presumed to be borrowed upon the faith of her separate estate. If money be lent or equipment furnished to the wife in carrying on her separate business, the title to the business is not affected, and it does not become community property.

"The courts have shown an increasing tendency to find that loans have been made upon the faith and credit of the separate property of either spouse. \* \* \*

"The mere fact that existing mortgages are assumed or the fact that mortgages are given by husband and wife as a part of the purchase price is not, in itself, conclusive that the credit represented by the mortgages is the credit of the community. Where then property is purchased by a married woman as and for her separate property, the mere fact that her husband joins with her in executing a note and mortgage to secure part of the purchase price does not rebut the deduction that the property is separate, the entire consideration having been furnished by the wife. The rule is the same where title is taken in the name of the husband."

As indicated in the above quotation, there has been a marked tendency in the cases to affirm findings that a particular loan was made upon the personal credit of one spouse upon the credit of his or her separate property. This is particularly true where property is purchased by one spouse with the proceeds of the loan and taken in the name of the borrowing spouse. The cases find no difficulty in finding property purchased with loans made after marriage to be separate property if made upon personal credit upon the faith of separate property in spite of §§ 162-164 of the Civil Code. Those sections define separate property as property acquired before marriage and that acquired afterward by gift, bequest, devise or descent, or the rents, issues or profits therefrom, while "all" other property is deemed to be community property. The theory is that a loan made upon the credit of one spouse, is, in effect, derived from the separate property of that spouse.



In *Vandervort v. Godfrey*, 58 Cal.App. 578, 208 P. 1017, the court squarely held that the test is whether the credit is advanced upon personal credit or upon credit of the community property. The trial court had found that the property purchased with the loan was community property. In reversing the judgment the court pointed out that the deed to the property had been taken in the name of the wife who had borrowed the money, and pointed out that such a deed raises a disputable presumption that the property was separate. The court then stated (58 Cal.App. at page 581, 208 P. at page 1018): "To rebut this presumption the respondent relies upon the claim that the property was purchased by money borrowed by the wife during coverture; but, as we have seen, if any money was borrowed in the sense that a loan was made from the daughter, it was obtained upon the sole credit of the wife and not upon the credit of the community." The court points out that under § 167 of the Civil Code, when a wife borrows money after marriage, the community property is not liable for the debt, and emphasizes that the loan here involved was "her individual obligation, and not binding upon the community," and was made "upon the sole credit of the wife," and upon her "individual credit." The court then holds that the presumption that the property was separate property because of the deed being in her name can only be overcome "by clear and convincing proof," and that it was not overcome by evidence that the property had been purchased with a loan secured on her credit.

[6] When one spouse borrows money on other than the credit of the community, and title is taken in the name of the borrowing spouse but both spouses sign a mortgage or note, this last factor does not make the property community, or overcome the presumption. *Heney v. Pesoli*, 109 Cal. 53, 41 P. 819; *Flournoy v. Flournoy*, 86 Cal. 286, 24 P. 1012, 21 Am.St.Rep. 39. If the personal credit of one of the spouses is the basis of the loan, the mere fact that no security is given for the loan is of no importance in overcoming the presumption. *Flournoy v. Flournoy*, 86 Cal. 286, 24 P. 1012, 21 Am.St.Rep. 39; *Dyment v. Nelson*, 166 Cal. 38, 134 P. 988; *Farmers' Exch. Nat. Bank v. Drew*, 48 Cal.App. 442, 192 P. 105; *In re Estate of Barnes*, 128 Cal. App. 489, 17 P.2d 1046. For other cases where, under various factual situations, the

property purchased with loans has been held to be separate see *In re Estate of Ellis*, 203 Cal. 414, 264 P. 743; *Stewart v. Stewart*, 113 Cal.App. 334, 298 P. 83; *Rothschild v. Davis*, 217 Cal. 660, 20 P.2d 329.

At least two cases have held, on special facts, that the property purchased with the proceeds of a loan was community. Neither is in point. In *Moulton v. Moulton*, 182 Cal. 185, 187 P. 421, the purchase price of property was paid, in part, with funds borrowed on the note of the wife, but title was taken in the name of the husband. That factor was found to be decisive and it was held that the property was community. *Schuyler v. Broughton*, 70 Cal. 282, 11 P. 719, involved a case where the wife borrowed money and used it to buy property, title to which was taken in her own name. It was held that the property was community. That case, however, was decided in 1886. It was not until 1889 that the statute first provided that property conveyed to a married woman by an instrument in writing is presumed to be her separate property. See discussion and cases cited 3 Cal.Jur.Supp. p. 558, § 64. *Mosesian v. Parker*, 44 Cal.App.2d 544, 112 P.2d 705, relied upon by defendant, makes the broad statement that it is the "general rule that money borrowed on personal security by a husband or wife is community property" (44 Cal.App.2d at page 550, 112 P.2d at page 709), but the remark was not a very important part of the decision. The use of the phrase "personal security" is misleading, because if it means personal credit upon faith of separate property it is clearly erroneous. Moreover, that case did not involve the presumption found in § 164 of the Civil Code.

[7,8] The defendant's theory that the presumption that property standing in the name of the wife alone is her separate property, is overcome, as a matter of law, by the presumption that property purchased with borrowed funds is community. We do not so interpret the cases. Such rule would be inconsistent with the rule announced in many cases that the presumption of separate character of the property codified in § 164 of the Civil Code is not overcome by a showing that the property was actually purchased with community funds. In such case it will be presumed that a gift was intended, and the burden is upon the husband to overcome that presumption. See cases collected 3 Cal.Jur.Supp. p. 558, § 64; p. 650, et seq.,

§§ 135-137. That is, where the conveyance is in the name of the wife as grantee and it appears that the purchase price has been paid with community funds, other than borrowed funds, it will be presumed that a gift of such funds by husband to wife was intended, and the burden is on the husband to show the absence of donative intent. But the rule for which defendant contends is that although the conveyance is to the wife alone, the presumption that the property is her separate estate disappears upon a showing that the purchase price has been paid with funds borrowed upon the note of the wife alone, for which note community funds are not even liable. There is no justification for such an unreasonable rule, and the cases do not sustain it. The better rule would seem to be that when the wife borrows money to buy property and takes title to such property in her name alone the burden rests on the husband to prove that the loan was made on the credit of the community. The primary presumption is the statutory one that when title is taken in the name of the wife alone it is her separate property. That presumption cannot be overcome by a mere showing that the property was purchased by a loan. The husband must further show that the loan was made on the credit of the community property, and rebut the presumption of a gift.

[9] Applying these rules to the facts of this case, it is apparent that the husband did not sustain the burden imposed upon him. These parties, although married, were living separate and apart. There was no confidential relation in fact existing between them. Prior to the foreclosure the wife presumably owned, practically speaking, a three-fourth interest in the property and the husband owned a one-fourth interest. Although some evidence was offered by the husband to the effect that the property was originally purchased with his separate funds, he offered no evidence at all to rebut the presumption of a gift. The deed at the foreclosure sale named the wife as grantee. That raised a strong presumption that it was her separate property. While she testified that the money used in its purchase was secured from her half brother, it is a reasonable inference that the loan was made solely on the personal credit of the wife. Certainly, in view of the provisions of § 167 of the Civil Code, both from a standpoint of law and fact, the loan could not have been made on

the credit of the community. The husband offered no evidence at all to rebut the inference that the loan was made on the personal credit of the wife. On such a record the only reasonable conclusion possible is that the property was her separate property.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.



59 Cal.App.2d 303

**In re BAIRD'S ESTATE.  
SHERMAN v. INGELMAN et al.  
Civ. 13880.**

District Court of Appeal, Second District,  
Division 3, California.

June 23, 1943.

Rehearing Denied July 11, 1943.

Hearing Denied Aug. 19, 1943.

**1. Executors and administrators ☞88**

If note executed by one of executors to estate for personal obligation fell due before probate court approved final account of executors and ordered distribution, executor executing note should have been charged with the amount of note in his account. Probate Code, § 602.

**2. Courts ☞202(3)**

Findings as to the facts are required in trial of contested probate matters where issues of fact are joined. Probate Code, § 1230; Code Civ.Proc. § 632.

**3. Contracts ☞212(1)**

The rule which applies to an obligation which is to be performed when certain property of obligor is sold is that performance becomes due when a reasonable time has elapsed for making of the sale.

**4. Executors and administrators ☞88**

Where one of executors executed note to estate for his personal obligation payable when executor sold certain lots owned by him, there was an implied obligation on part of executor to make diligent effort to sell the property, and use of diligence would be assumed in determining what would be a reasonable time within which to effect a sale.

**5. Executors and administrators** ⇨88

Where one of executors executed note to estate for his personal obligation payable when executor sold certain lots owned by him, fact that no sale of lots had been made did not preclude finding that a reasonable time within which to effect a sale had elapsed, so that note had become due.

**6. Executors and administrators** ⇨88

Where one of executors executed note to estate for his personal obligation payable when executor sold certain lots owned by him, a "reasonable time" within which to effect a sale had elapsed, so that note had become due, notwithstanding that no sale had been effected, where more than seven years had elapsed during which several other lots in business district in which executor's lots were located had been sold.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

Appeal from Superior Court, Ventura County; Atwell Westwick, Judge.

Proceeding in the matter of the estate of Madeline Baird, deceased. From an order denying petition of Pullam Sherman for partial distribution under deceased's will and from a judgment settling the final account of the executors and for distribution of all the estate to Pullam Sherman, Pullam Sherman appeals. Appeal is opposed by John Ingelman and Bank of America National Trust & Savings Association, executors of the estate of Madeline Baird, deceased.

Reversed with directions.

S. T. Hankey, and G. Harold Janeway, both of Los Angeles, for appellant.

Isaac Martin Sackin, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by Pullam Sherman from an order dated April 16, 1942, denying his petition for partial distribution under the will of Madeline Baird, deceased, and a judgment settling the final account of the executors and for distribution of all of the estate to said Pullam Sherman. The estate consisted of cash in the amount of \$8,614.04, and a promissory note for \$11,000 executed by John Ingelman (herein designated as respondent), one of the executors, in favor of the estate of decedent.

[1] Respondent and his coexecutor, a corporation, filed their final account, in which they listed the promissory note of Ingelman as one of the assets of the estate; the account was settled and the estate, including the note, was distributed to appellant as sole distributee. Appellant's contention is that it was the duty of the coexecutor, John Ingelman, to account for the amount of the note as for cash on hand. He relies upon section 602 of the Probate Code, which reads as follows: "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same as for so much money in his hands, when the debt or demand becomes due." The question is whether the note fell due before the court approved the account and ordered distribution, for if it was then due Ingelman should have been charged with the amount of it in his account. In re Estate of King, 1942, 19 Cal.2d 354, 121 P.2d 716.

By his petition for partial distribution appellant sought distribution of the cash on hand but not the note. By the account, the exceptions thereto, and the petition for partial distribution, an issue of fact was raised as to whether the note had become due, and this material issue was tried upon the hearing. The court made no findings as to the facts which would determine whether the note had become due, other than by means of recitals in the order appealed from. Since the sufficiency of these recitals to determine the issue of fact involved is not questioned by appellant, we shall treat them as sufficient.

[2] Findings are required in the trial of contested probate matters where issues of fact are joined. Probate Code, sec. 1230; Code of Civ.Proc. sec. 632; In re Estate of Dodds, 1942, 52 Cal.App.2d 287, 126 P.2d 150; In re Estate of Pala, 1942, 55 Cal.App.2d 647, 131 P.2d 593. The somewhat common practice of neglecting to make findings in such matters cannot be approved.

According to respondent (and the facts are not disputed), he borrowed \$11,000 from the testatrix in October, 1935, and gave her a note for the amount, which drew interest at the rate of 2 percent per annum and which was to become due when he sold certain lots which he owned in Hollywood. This note was not found among the belongings of decedent.



In August, 1940, upon petition filed by Ingelman, in which his coexecutor did not join, an order was made allowing the executors to receive as evidence of the indebtedness a note reading as follows: "\$11,000.00. Los Angeles, California, September 3rd, 1940. When I shall sell the Seaboard National Bank lots in Hollywood after date, I promise to pay to the order of the Estate of Madeline Baird, deceased, Eleven Thousand and no/100 Dollars, for value received, with interest at 2 per cent per annum from September 3rd, 1940, until paid, both principal and interest payable only in lawful money of the United States. Payable when I sell my Seaboard National Bank lots in Hollywood. John Ingelman." The new note purported to follow, substantially, the terms of the original one, except as to name of payee and date.

The record shows that respondent owns property at the northwest corner of Whitley Avenue and Hollywood Boulevard in Hollywood, with a frontage on Hollywood Boulevard of approximately 92.5 feet and a depth of 115 feet. It is agreed that this is the property referred to in the note. It is improved with a steel and concrete building having store rooms on the ground floor, offices on the second floor, and a penthouse above a portion of the second story. It is located within what is conceded to be the most valuable business section of Hollywood between Vine Street and Highland Avenue. The ground floor corner room is occupied by a branch of the Bank of America. In January, 1938, the property was mortgaged to Winter Investment Company for \$136,000; this mortgage was retired and a new mortgage was given in August, 1941, for \$123,000 in favor of Prudential Insurance Company. The property is subject to a 99-year ground lease which is now held by Hollywood-Whitley Corporation; it calls for rental of \$1,800 per month and for payment of taxes by the lessee. For some three years prior to the trial the lessee had been paying only about \$15,000 a year in addition to taxes, the lessor had been paying interest and installment payments on principal of the mortgage and above these payments had been receiving a net income from the property of between \$2,000 and \$3,000 per year. The lessor, respondent, is in a position to terminate the lease because of default in payment or rentals. The property as a whole is valued by respondent at from \$250,000 to \$300,000.

Appellant's contention is that the note would become due when a reasonable time had elapsed for sale of the property; he insists that the proof showed that such time had elapsed between the date when the money was borrowed and the date of trial, and that respondent should therefore have been charged with the amount.

Respondent contends that his obligation was only to use reasonable diligence to effect a sale of the property; that the evidence clearly showed that he had used such diligence and that, no sale having been made, the note was not due at the time of distribution and will never become due until a sale is made, providing respondent continues to diligently endeavor to effect a sale.

[3] Undoubtedly the rule which applies to an obligation which is to be performed when certain property of the obligor is sold is that performance becomes due when a reasonable time has elapsed for the making of the sale. *Lobree v. L. E. White Lumber Co.*, 1921, 53 Cal.App. 85, 92, 199 P. 821; *Campbell v. Kennedy*, 1918, 177 Cal. 430, 432, 170 P. 1107; *Van Buskirk v. Kuhns*, 1913, 164 Cal. 472, 129 P. 587, 44 L.R.A.,N.S., 710, Ann.Cas.1914B, 932; *Spangenberg v. Spangenberg*, 1912, 19 Cal. App. 439, 444, 126 P. 379; *Samuels v. Larrimore*, 1909, 11 Cal.App. 337, 339, 104 P. 1001; *Earle v. Sunnyside Land Co.*, 1907, 150 Cal. 214, 224, 225, 88 P. 920; *Williston v. Perkins*, 1876, 51 Cal. 554.

[4,5] Cases relied upon by respondent, such as *Van Buskirk v. Kuhns*, supra, in which the promise was to pay "when he is able" or "as soon as he gets the money" or "when it is convenient to pay" are not in point. The most diligent effort to earn money may fail and in some cases indefinitely postpone the maturity of a debt because the parties have expressed that intention in the writing, but where payment is to be made when certain property has been sold, the debt falls due when a reasonable time has elapsed, even though no sale has been made. The element of the use of diligence enters into contracts to pay when property is sold, to the extent that there is an implied obligation to make diligent effort to sell the property, and the use of diligence is a factor which is assumed in the determination of what would be a reasonable time within which to effect a sale. The mere fact that no sale has been made does not preclude the court from

finding that a reasonable time has elapsed; the price and terms demanded may be just as important as the element of time.

[6] We have concluded that the implied finding that a sufficient time had not elapsed for a sale of the property is without support in the evidence.

Appellant's evidence showed that some fifteen pieces of property had been sold in the business district in which the Ingelman lots are located during the 6½ years in question. These sales ranged from \$37,500 to \$908,000 and amounted in the aggregate to more than \$3,000,000. It is not disputed that property in that locality is the most valuable business property in Hollywood. Respondent's property produced an income, after payment of taxes, of at least \$15,000 per year. The proof offered by respondent was to the effect that he had had the property listed for sale with numerous agents during all of the time in question and that he had received no offer for it. However, it appears that he had made no effort to sell his interest in the property separately from the interest of the lessee. His direct testimony to that effect was not rendered less positive by his statement that he would have been willing to sell it "either way." It had been listed for sale by the lessor and the lessee and they had given one option on it for a gross consideration of \$250,000 or more, presumably because a portion of the price received would have gone to the lessee, but respondent had never listed or priced his interest separately. It is clear from the record that respondent did not consider himself to be under any obligation to offer the property for a less price than the lessee agreed to, although the record is silent as to how the selling price would have been divided between them in case of a sale. The wording of the note did not allow respondent to withhold payment until he and Hollywood-Whitley Company had sold both of their interests in the property. The lessee was not obliged to sell and could, and evidently did, hold the price above what the market justified or the property as a whole could have been sold for. The note placed respondent under an obligation to use reasonable diligence to sell his lots and that could only mean his interest in the lots, which he did not at any time endeavor to do. It may be conceded that diligent effort was made to sell the entire property for \$250,000 and that no offers were received, but

where seven years have elapsed and no sale has been made, it must be that the price has been held too high. The property was well improved, well located, and was paying the lessor, above taxes, 6 percent gross upon a valuation of \$250,000. There is nothing in the evidence to justify the belief that respondent could not readily have sold his interest in the property at a price that would have given him several times the amount of the note. He was not obliged to sell it; he could hold it indefinitely in the hope that the prices of 1926-27 would return when, as respondent testified, his property was worth \$400,000, but we cannot agree that he had the right, under his contract, to keep his friend's money at 2 percent interest until he could get his price.

The judgment and order are reversed for further proceedings in accordance with the views herein expressed.

PARKER WOOD, J., and SHAW, J.  
pro tem., concur.

Hearing denied; CARTER, J., dissenting.



59 Cal.App.2d 331

ABERCROMBIE v. THOMSEN.  
Civ. 6798.

District Court of Appeal, Third District,  
California.  
June 24, 1943.

#### 1. Appeal and error ⇐933(1), 977(1)

An order granting or denying new trial is conclusive unless it appears that there has been an abuse of discretion, and all presumptions in favor of order will be indulged in upon appeal.

#### 2. New trial ⇐71

In action for death of motorist struck by truck after motorist made left turn at intersection, wherein evidence was in conflict as to exact location of collision, granting new trial after jury returned a verdict for truck owner was not an abuse of discretion.

**3. Appeal and error** ⇨977(3)

A stronger showing is required to justify interference with order granting new trial than one which has been denied.

**4. Appeal and error** ⇨977(3)

An order granting new trial will not be set aside where there appears to be a reasonable or fairly debatable justification therefor, notwithstanding a contrary order might not be disapproved.

**5. New trial** ⇨7

Any serious doubt on application for new trial should be resolved in favor of application.

**6. New trial** ⇨20

Granting new trial because of failure of a juror to disclose that he was a client of one of defendant's counsel was not an abuse of discretion, under showing that some two and a half years prior to time of trial counsel had filed a probate proceeding for the juror and that no further steps were taken to conclude the proceedings because of improvident condition of the estate. Code Civ.Proc. § 602.

**7. Appeal and error** ⇨977(3)

An order granting new trial would be sustained in absence of affirmative showing of manifest abuse of discretion.

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Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Lillie B. Abercrombie, administratrix of the estate of Robert J. Abercrombie, deceased, against Herbert Thomsen to recover for the intestate's death resulting from a collision between intestate's automobile and defendant's truck, wherein defendant filed a cross-complaint. From an order granting plaintiff's motion for a new trial after jury returned a verdict in favor of defendant on the complaint but against him on his cross-complaint, the defendant appeals.

Affirmed.

Blaine McGowan, of Eureka, and Burt W. Busch, of Lakeport, for appellant.

Lovett K. Fraser, of Lakeport, and Jesse E. Nichols, of Oakland, for respondent.

PEEK, Justice.

This is an appeal by the defendant from an order granting plaintiff's motion for a new trial. The action arose out of a

collision between an automobile operated by the deceased husband of plaintiff and a truck operated by defendant.

The plaintiff brought the action as administratrix of the estate of her deceased husband on behalf of herself and their three minor children. The answer of defendant denied the allegations of negligence appearing in the complaint, and charged decedent with contributory negligence; he also filed a cross-complaint charging deceased with negligence. At the conclusion of the trial a verdict was rendered by the jury in favor of the defendant on the complaint but against him on his cross-complaint. Thereafter plaintiff moved for a new trial, and after a hearing thereon the court made its order granting the motion upon the grounds of, (1) insufficiency of the evidence to sustain the verdict, and (2) that plaintiff was prevented from having a fair trial because of the failure of one juror to disclose that he was a client of one of defendant's counsel, and therefore subject to challenge for cause under Section 602 of the Code of Civil Procedure.

The accident itself occurred approximately a mile west of the town of Upper Lake at a point where the Ukiah-Tahoe highway, running in a general easterly and westerly direction, is intersected by what is known as the Upper Lake road. The only substantial controversy has to do with the question,—on what side of the highway did the collision occur; in all other particulars there is but slight variation in the evidence.

Plaintiff's testimony was that they had stopped at the stop sign before entering the highway; that defendant's truck was observed some 300 feet easterly of the intersection; that they completely traversed the intersection to the right side of the highway, turned left and proceeded easterly in their proper lane, but that defendant turned his truck from his lane over the center line into the half of the highway where deceased was driving; that decedent turned to the right in an effort to avoid the accident but the truck hit their car, the right front of the truck striking the left front and side of decedent's car.

The defendant's testimony was that decedent did not wait until he reached his side of the highway before turning to the left, but, in effect, deceased cut the corner and thereafter continued on the left or wrong side of the highway directly in the path of the on-coming truck, and al-



though defendant put on his brakes and turned to the left he was unable to avoid the collision.

There are no eyewitnesses to the actual collision. One witness claimed to have noticed the rear end of the truck turn or swing to the right shortly before the collision occurred. There was considerable evidence of a skid mark, observed by witnesses immediately after the accident, which started on defendant's or north half of the highway and moved across the center to the south side, the mark extending about ten feet across the white center line. However, a traffic officer testified the only mark was on the south side of the highway.

The defendant, appellant herein, in particular objects to the statement by the judge in his order granting a new trial that: "The evidence establishes almost without conflict that the impact \* \* \* occurred on Abercrombie's own right hand, or the south, side of the highway, and that it was the left hand side of the Abercrombie car that was struck." The order contained the further statement by the court to the effect that decedent stopped his car before entering the intersection; that the visibility at the intersection was unobstructed; that his car had proceeded for at least a car's length along the highway before it became evident that the truck was about to cross into his lane; that the only question for consideration is whether or not the truck was in such a position as to appear to a reasonable person that it was an immediate hazard; that apparently it was not, by reason that decedent was in his proper lane at the time of the impact; that such facts leave no negligence proven on the part of decedent; that had the truck remained on its proper half of the highway no accident would have occurred.

In a similar case, *Owings v. Gatchell*, 32 Cal.App.2d 482, 90 P.2d 368, 370, wherein, as here, there was a conflict in the evidence as to the movement of the cars preceding the accident and also a conflict as to the lane in which the impact occurred, an order granting a new trial for insufficiency of the evidence after a jury's verdict was upheld: "The well-settled rule is, however, that the matter of granting or refusing to grant a motion for a new trial is largely within the discretion of the trial court \* \* \*; that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal \* \* \*;

but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it \* \* \*; and if satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial \* \* \*; that even though the evidence is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial \* \* \* and that it is only in rare instances and upon very strong grounds that the determination of the trial court will be disturbed."

[1] The granting or denying of a new trial rests so fully in the discretion of the trial court that its action is conclusive upon this court unless it appears that there has been an abuse of such discretion, and all presumptions in favor of such order will be indulged in upon appeal. In *re Estate of Wood*, 131 Cal.App. 465, 21 P.2d 626.

Defendant herein concedes the correctness of the foregoing rule but argues that there is no conflict in the evidence as the decedent's contributory negligence was established as a matter of law by uncontradicted evidence that if decedent had looked when he stopped at the stop sign he would have seen defendant approaching and would not have placed himself in peril. As against this, however, is plaintiff's testimony that when they entered the intersection defendant was some 300 feet away and that they not only had ample time to but did in fact cross the highway to their own lane, and the accident would not have occurred if the defendant had remained on his side of the highway. But whatever the personal contentions of the parties may be the fact remains that the trial court granted the motion for a new trial.

[2] If the appeal herein was from the judgment entered on the verdict in favor of defendant, it is quite possible it would be held that the evidence presented would be sufficient to sustain such judgment, but that is not the situation. Here we are dealing with an appeal from an order of the trial judge granting a new trial, and therefore on such an appeal we are governed by a totally different rule, for under that rule it is entirely beyond the power of the reviewing court to interfere with the de-

termination of the trial court unless a manifest abuse of discretion appears. *Malloway v. Hughes*, 125 Cal.App. 573, 13 P.2d 1062; *Hunt v. Pacific Electric Railway Co.*, 51 Cal.App.2d 11, 124 P.2d 89. No such abuse of discretion has been shown.

Appellant further contends that the trial court erred in granting a motion for a new trial on the second point, to-wit: the failure of a juror to reveal his relationship with one of the attorneys. The statement of the trial court was to the effect that although none of the questions asked were directed specifically to this relationship, yet the general questions required an answer but none was given; that the unfairness of one attorney having a client on the jury is manifest; that the law recognizes that bias is liable to exist under such circumstances; that the juror must be excused when so challenged, and that if such relationship is not revealed the opposing side is deprived of an opportunity to exercise its right of challenge. In answer to this statement by the court the defendant states there was no direct question put to the juror which would have caused him to answer other than as he did, and that to a lay mind such a relationship has no significance.

The affidavit of the defense counsel shows that approximately two and one-half years prior to the time of trial he filed certain probate proceedings for the juror in question but because of the improvident condition of the estate no further steps were taken to conclude the proceedings. It is defendant's contention that by reason of the fact that the proceedings were started more than a year previous and that it is doubtful if the juror or defense counsel even had the matter in mind during the questioning, that such a situation presented nothing that was prejudicial to the plaintiff, and that therefore the question was not one which was contemplated by Section 602 of the Code of Civil Procedure. Technically the juror was still represented by defendant's counsel, for the estate was still open and no action had been taken to close it.

The case of *Mast v. Claxton*, 107 Cal. App. 59, 290 P. 48, 51, earnestly argued by defendant as directly in point is very similar to the one now before us. There the

jury having given judgment to plaintiff, the defendant moved for a new trial. Upon denial of that motion he appealed, and among other things, alleged misconduct on the part of one of the jurors wherein he failed to reveal that he had been a client of one of the opposing counsel. In reviewing the case the appellate court stated: "The question was entirely within the discretion of the trial court. It had the entire matter before it, heard and participated in the examination of the juror, and was in a better position to determine whether or not the situation worked to the prejudice of appellant than is this court."

[3-6] It is likewise true in this case the trial court heard the entire proceedings. After an evaluation of all of the facts it was the studied opinion of the court, based upon such facts and the knowledge of the entire case, that the plaintiff was precluded from having a fair trial. True, the factual conditions are very similar and the same situations exist in each case with the exception of one fundamental distinction. In the *Mast* case, *supra*, a motion for a new trial was denied; here the motion was granted. Therefore, the appellant herein is confronted with the further and well-established rule that a stronger showing is required to justify interference with an order granting a new trial than one which has been denied. *Whitfield v. Debrincat*, 18 Cal.App.2d 730, 64 P.2d 960. Nor will the order be set aside where there appears to be a reasonable or fairly debatable justification therefor, even though a contrary order might not be disapproved (20 Cal.Jur. 30), and where the trial court has any serious doubt it should be resolved in favor of the application. *Hole v. Takekawa*, 165 Cal. 372, 132 P. 445. That the court had a serious doubt is self-evident from the order granting the motion.

[7] In view of the foregoing and in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion we must sustain the order of the trial court. *Whitfield v. Debrincat*, *supra*.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

NEET et al. v. HOLMES et al.\*

Civ. 13871.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer".

District Court of Appeal, Second District,  
Division 1, California.

June 21, 1943.

Rehearing Denied July 20, 1943.

Hearing Granted Aug. 19, 1943.

1. Conspiracy Ⓒ18

In action for conspiracy to defraud, allegation that one defendant pursuant to conspiracy represented to plaintiffs that value of their interest in mining lands was problematical, that he desired consolidation of interests of all parties in corporation for ease in management, and concealed belief in value of lands and intent to lease lands to other defendants on royalty basis through corporation was insufficient to establish "fraud", in view of fact that at such time value was problematical.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. Conspiracy Ⓒ9

A failure to render a proper accounting in itself does not vitiate entire undertaking or warrant its being classified as a conspiracy to defraud.

3. Conspiracy Ⓒ9

Where plaintiffs at defendants' solicitation transferred their interest in mining property to corporation which acquired all undivided interest in such property and leased property on royalty basis, plaintiffs' remedy upon failure to receive all royalties to which they claimed they were entitled was an accounting and not an action for conspiracy to defraud.

4. Conspiracy Ⓒ9

Mines and minerals Ⓒ101

The formation of a corporation to hold various undivided interests in mining property in exchange for stock and the leasing by corporation of such property to mining partnership did not make either partnership or promoter "joint adventurers" with dissatisfied stockholders creating a relationship of trust and confidence by which such stockholders could base action for conspiracy to defraud because they did not receive as much in royalties as they thought proper.

138 P.2d—45

\* Subsequent opinion 154 P.2d 854.

5. Trusts Ⓒ103(1)

Where mining partnership desired to work old mining land and holders of various interests therein consolidated interests in corporation which leased land to partnership and partnership in operating mine bore entire expense and risk of loss and paid royalties to corporation, there was no "joint venture" upon which a "constructive trust" for benefit of stockholders in mineral claims of partnership contiguous to corporation's land could be based.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust" and "Joint Venture".

6. Executors and administrators Ⓒ115

Where decedent owned mining land, in absence of anything to show that devisees had any intention of locating a claim on adjoining land or even working their holdings, act of administrator in obtaining claims on adjoining land in connection with his operation of devisees' lands under lease from corporation formed for that purpose was not a breach of any fiduciary relationship to devisees.

7. Pleading Ⓒ225(2)

Where plaintiffs endeavored without success four times to state a cause of action, trial court had discretion to deny further leave to amend.

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Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Thomas Porter Neet and others against Kenneth A. Holmes and others to recover damages from an alleged conspiracy by defendants to obtain use of plaintiffs' interest in mining property and for other relief. From a judgment of dismissal after defendants' demurrers had been sustained without leave to amend, plaintiffs appeal.

Affirmed.

See, also, 19 Cal.2d 605, 122 P.2d 557.

Wm. Ellis Lady, W. I. Gilbert, Jr., and Finlayson, Bennett & Morrow, all of Los Angeles, for appellants.

Ralph D. Brown, of Los Angeles, for respondents Kenneth A. Holmes and others.



Joseph Doyle, of Los Angeles, for respondents Mary Genevieve Shipp and Ralph C. Collette.

Geo. I. Devor and Geo. L. Reimbold, both of Los Angeles, for respondent Ray H. Fitzgerald.

DORAN, Justice.

This is an appeal by plaintiffs from a judgment dismissing the action, after the trial court had sustained defendants' demurrers, without leave to amend, to the second and fifth causes of action set forth in the amended complaint then before the court, and after plaintiffs, upon said demurrers being sustained, had voluntarily dismissed the two remaining causes of action set forth in the complaint. The amended complaint in question was the fourth complaint filed in the action and was designated "Second Amended Complaint Redrawn in Conformity with Ruling on Motion to Strike." It has been referred to herein as the fourth complaint, and for convenience will be designated merely as "the complaint".

The case involves certain mining claims and mining patents located in Imperial County; and it should be stated at the outset that the allegations of the fourth complaint herein reveal what in general amounts to a usual plan of operations in the history of gold mining in the State of California. Plaintiffs, however, in their complaint charge certain of the defendants with a conspiracy to defraud plaintiffs; and the following facts are drawn from the allegations of the complaint:

In 1896 one Mary E. Greathouse was the owner of a 55/100ths interest in three patented mining claims located in what is now Imperial County, in the State of California, and one Kate S. Wright was the owner of the remaining 45/100ths interest therein. The plaintiffs are either heirs or successors in interest of Mary E. Greathouse. Defendants Sumner B. Wright and Nina B. Slatter are successors in interest to Kate S. Wright and were joined as party defendants because of a failure to comply with plaintiffs' demand to join in the action. It is alleged that defendants Kenneth A. Holmes and Edmund A. Nicholson were associated as partners in mining ventures and that in the latter part of the year 1934 or in the early part of 1935 the said defendants made an examination of the said patented claims and the tailings thereon, and, apparently on the

basis of the information thus obtained, believed the claims were valuable. Thereafter defendants Holmes and Nicholson "ascertained the existence and identity" of defendant Fitzgerald, conferred with him and informed him of their examination of the claims and their opinions thereon. It is charged that these three defendants then entered into "a conspiracy, scheme, plan and arrangement for the purpose of unlawfully and illegally, and by the practice of fraud as hereinafter alleged, obtaining for their own use and benefit the possession and control of the aforesaid patented claims and tailings thereon". The overt acts in furtherance of the conspiracy involve the plan of defendants to consolidate the interests of plaintiffs, who lived out of the state, in order that the mining operations could be expedited. This plan embodied the formation of a corporation, viz: the Rayfitz Company, to which plaintiffs transferred their interests in exchange for shares of stock in the corporation. Plaintiff Neet was made a member of the board of directors of the corporation. The corporation then executed a lease of the patented claims to defendants Holmes and Nicholson for the purpose of carrying on the mining operations. The lease provided for the payment of royalties to the corporation, based upon a percentage of the recovery. This lease was entered into August 7, 1935, and was for a term of five years, expiring on August 7, 1940. After the execution of the lease Holmes and Nicholson went into possession of the claims, started mining operations and continued the same to the end of the term of said lease and paid to the corporation or a representative of plaintiffs royalties as provided in the lease.

It is alleged that the defendant conspirators failed to disclose to the stockholders the true terms and conditions of the lease and falsely and fraudulently represented that the said lease was fair in every respect so far as the corporation, the Rayfitz Company, and the stockholders were concerned. A copy of the lease is attached to the complaint as an exhibit but the complaint does not allege wherein or in what respect the terms of the lease were not fair or were not as represented.

During the term of said lease and about September, 1937, it was discovered by plaintiffs that defendants Holmes and Nicholson had financed the first trip defendant Fitzgerald took to Kentucky in an effort to see the plaintiffs or some of them

and induce them to enter into the plan; that adjoining lands to said claims had been located by others; that Fitzgerald was being paid \$200 per month by the Rayfitz Company and that extensive mining was being done under the lease. Plaintiffs therefore took over the control of the Rayfitz Company in February, 1938, elected a new board of directors; and in November, 1938, the said corporation and plaintiffs gave notice to defendants of the rescission of the lease, together with a demand for possession and an accounting. Defendants did not comply with said demands and thereafter the said defendant lessees paid all royalty checks to William Ellis Lady, attorney for plaintiffs, until the lease terminated. Lady acknowledged receipt of the royalties for and on behalf of said Rayfitz Company and plaintiffs, but in doing so, expressly stated that such moneys were being received without waiver of the notice of rescission. Thereafter plaintiffs gave Rayfitz Company notice of the rescission of the transaction pursuant to which they had conveyed their 55/100ths interest in the said three claims covered by the lease, the corporation consented thereto, and on July 5, 1939, conveyed said interest to Fred Glenn as trustee and shortly thereafter the said trustee transferred said interests to plaintiffs and the stock of said corporation was returned to the corporation. The same process was followed with regard to the interest of defendant Slatter and the interest held by defendant Fitzgerald on behalf of defendant Wright; but it does not appear in this case that the stock certificates were surrendered for the said interests.

To better illustrate the nature of the overt acts alleged to have been committed in furtherance of the conspiracy the following is quoted from the complaint, being a portion of paragraph XIV of the second cause of action:

"(e) Defendant Ray H. Fitzgerald, on or about February 27, 1935, proceeded to the City of Versailles, Kentucky, arriving at said place on or about March 1, 1935. On or about said date he contacted at said place plaintiff Thomas Porter Neet, and entered into negotiations with said Thomas Porter Neet, in the course of which he wilfully and carefully concealed from plaintiff Thomas Porter Neet, and from said Jessamine Porter Neet, said conspiracy with defendant Kenneth A. Holmes and said Edmund A. Nicholson, and that the

expenses of his journey were being paid by the defendant Kenneth A. Holmes and said Edmund A. Nicholson, or that said conspirators had had any discussions, plans or negotiations whatever with respect to said three claims, or that the tailings and workings thereon were valuable; but on the contrary he represented to plaintiff Thomas Porter Neet that said properties were of little and problematical value, being an old worked out mine, and a mere gamble and had no real or substantial merit; that he had not in mind any prospective operators, nor did he know of anyone interested in said patented claims; and that he was making said trip at his own expense to investigate the possibility for future action on behalf of his relatives, defendant Sumner B. Wright and said Kate S. Wright; that if a way could be found to consolidate all interest in said patented claims, he would devote of his time solely in order to be helpful to said Sumner B. Wright and Kate S. Wright, and find out what could be done about said patented claims. Whereupon, said Ray H. Fitzgerald suggested that the interest of the various owners of said patented claims be conveyed to a corporation, and, in order to further lull plaintiff Thomas Porter Neet into a sense of repose, also suggested that said Thomas Porter Neet should be a director thereof, but that he need not participate in the meetings, and management thereof in California, but that he could safely leave all those matters to the said Ray H. Fitzgerald by signing all necessary consents in blank;

"(f) While at Versailles, Kentucky, on or about March 1, 1935, and in order to further induce plaintiff Thomas Porter Neet to place trust and confidence in him, said defendant Ray H. Fitzgerald promised and agreed with plaintiff Thomas Porter Neet that he, said Ray H. Fitzgerald, as soon as he returned to the State of California, would locate or cause to be located or otherwise acquire that portion of the public domain contiguous and adjacent to and surrounding said patented claims which might be open to location or acquisition for the benefit of the owners of said patented claims, so that the said potential claims could be worked advantageously;  
\* \* \*

[1-3] It appears from the allegations of the complaint that defendants Holmes and Nicholson located claims on the contiguous territory. It also appears from the

allegations of the third cause of action that for ores removed from plaintiffs' holdings, of a value which might be estimated in excess of \$500,000, total royalties were paid of \$32,017.27. The nature of the charges of fraudulent dealing is revealed by the foregoing quotation; and it may be said that the allegations of the second cause of action here considered do no more than describe the progress of an ordinary mining venture, or, for that matter, the progress of any ordinary business venture. It is as if the term conspiracy were applied to the organization of any corporation. If plaintiffs did not receive all the royalties to which they claim they are entitled, that is a matter for an accounting between the parties. A failure to render a proper accounting in itself does not vitiate the entire undertaking or warrant its being classified as a conspiracy to defraud. The representations and concealments attributed to Fitzgerald, revealed by the above quotation, obviously are not of a character to constitute fraud under the circumstances presented. As to any representations as to the value or lack of value of the claims, it should be pointed out that the allegations reveal them to be old claims, that defendants Holmes and Nicholson only "believed" the claims had value. It therefore appears from the allegations made that at the time of the conference on the subject between Fitzgerald and Neet it was true that the value of the claims was problematical and that the venture was a mere gamble. In any event, the circumstances then existing, as revealed in the allegations of the complaint, justified such an expression of opinion on the part of Fitzgerald. It is sufficient to state here that the allegations of the second cause of action fail to reveal any fraud, actual or constructive upon the part of defendants.

[4] The attempt upon appellants' part to class the parties as joint adventurers and to demonstrate the existence of a relation of trust and confidence between defendants and plaintiffs is of no more avail here than if such attempt were made in any such venture. The parties were no more engaged in a joint adventure here than would be any parties to an effort to organize a corporation for the purpose of consolidating holdings in order to lease mineral rights for mining operations; and the parties are in no greater relation of trust and confidence than are any parties to any ordinary business deal. If the trans-

action recounted by the complaint in this instance resulted in a trust relationship the same might be said of all business transactions. Manifestly, defendants Holmes and Nicholson, who operated the mine under lease from the corporation, were neither joint adventurers with, nor trustees for, plaintiffs; and plaintiffs have completely failed to implicate any of the defendants in a conspiracy. They have shown no fraud nor any damage as a result thereof. As already mentioned, if plaintiffs feel that they should have received a greater share of the profits from the venture, that is a matter for adjustment between the parties by an accounting or otherwise. Plaintiffs may not found an action for fraud upon the sole fact that they did not receive as much as they feel they should. It might be pointed out that this action was commenced after the term of the lease had expired, and the value of the holdings had been proven by the operations. It should also be pointed out that the facts as stated by the complaint furnished plaintiffs no basis for a rescission of either the lease or the transaction wherein the corporation was formed.

[5, 6] By the fifth cause of action it is sought to establish a constructive trust in the claims contiguous to the patented lands, for the benefit of plaintiffs, which claims, as above mentioned, were located by Holmes and Nicholson. The practice of locating such claims contiguous to the location of a proposed site of operations is a common one in mining for gold. Appellants in their argument reveal the theory of this cause of action as one founded upon the existence of a fiduciary relation between Fitzgerald and plaintiffs, and also argue that such a relation also existed as between defendants Holmes and Nicholson and plaintiffs. The basis for such argument is that the parties were engaged in a joint venture. As already mentioned, the elements of a joint venture are lacking in the allegations made. The venture was one in which Holmes and Nicholson sought to set up mining operations upon the three old mining claims in question. In order so to do it was necessary to locate the owners of the interests in these claims and enter into some agreement with them whereby the claims might be worked. This was done, and to expedite proceedings the interests of the owners were consolidated through the organization of a corporation in which the owners of the interests became stockholders. The corporation then exe-



cuted a lease to Holmes and Nicholson, who operated the mine and paid royalties under the lease. It is plain that the parties involved were in no sense engaged in a joint undertaking, and that the interests of plaintiffs, of Fitzgerald, of Holmes and Nicholson, and of the other defendants were separate and distinct. There was certainly no joint venture by which the contiguous claims were established. This operation was one undertaken by Holmes and Nicholson to protect their interests as lessees. It of course follows that in thus protecting their interests defendants Holmes and Nicholson also protected the interests of plaintiffs, who of necessity stood to profit by efficient operation of the gold mine; but it must be emphasized that the interests of each of the parties in the operation was distinct. Plaintiffs incurred no expense and paid nothing for the location of the claims mentioned. In fact, the expense of the entire mining operation was borne by defendants Holmes and Nicholson, so far as appears from the complaint; and from all that appears, the risk of loss was likewise to be borne by them.

[6] Appellants make the further contention that, apart from their theory of joint adventure, since defendant Holmes was appointed administrator with the will annexed of the estate of Mary Greathouse, as such a fiduciary he breached his trust to plaintiffs as devisees, or successors of devisees, by locating or acquiring an interest in the outlying claims. In support of this contention appellants argue that the location of such claims adversely affected the interest of plaintiffs because Fitzgerald had promised plaintiffs that claims would be located on the surrounding territory for the benefit of the owners of the three patents, and that this promise was made for the purpose of dissuading and preventing and did dissuade and prevent plaintiffs from themselves making the locations. The facts of the complaint belie such argument. There is nothing to show that plaintiffs had any intention of locating claims on land adjoining their holdings. There is in fact no indication what-

soever that plaintiffs ever intended to work their holdings themselves; and from all that appears in the allegations of the complaint the holdings would probably never have been worked had it not been for the efforts of Holmes and Nicholson. It cannot be said, therefore, that upon the face of the complaint it appears that plaintiffs were in any way prevented or dissuaded from locating the contiguous claims. Moreover, from all that does appear, the promise of Fitzgerald in this respect, as allegedly made to Neet, was fulfilled through the location of the claims by Holmes and Nicholson. But there is absolutely no basis upon which to hold that plaintiffs had any equitable claim to these locations; and Holmes' action as an individual in locating the claims was in no way detrimental to the interests of the devisees or successors of Mary Greathouse, and hence not inconsistent with his position as administrator with the will annexed of her estate. It must be plain from a reading of the facts as alleged that this action in locating such claims was, if anything, beneficial to the interests of plaintiffs. Plaintiffs could not well expect to obtain an equitable interest in such claims without having paid any consideration for the acquisition thereof; and it does not appear that Fitzgerald, or any of the other defendants, obtained an unfair advantage of plaintiffs through the acquisition of such claims. No secret profits are shown to have been derived therefrom by Fitzgerald; in fact, the complaint falls short of revealing any unfair advantage to have been taken of plaintiffs in any respect.

The ruling of the court upon the demurrers to the second and fifth causes of action of the complaint was obviously correct; and in view of the fact that plaintiffs have endeavored four times over the period of a year to state their causes of action, each time without success, it clearly lay within the discretion of the trial court to deny further leave to amend.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

In re **STONE'S ESTATE.**

**BOMASH v. STONE et al.**

Civ. 13682.

District Court of Appeal, Second District,  
Division 3, California.

June 18, 1943.

Rehearing Denied July 14, 1943.

Hearing Denied Aug. 16, 1943.

**1. Wills** ⇨384

On appeal from judgment dismissing will contest and admitting will to probate, after special verdict was rendered for contestant, evidence was viewed in light most favorable to contestant.

**2. Wills** ⇨302(1)

Evidence going no further than to justify a suspicion that subscribing witnesses were not present when testator signed will and that they signed after his death, did not support special verdict that will had not been properly executed, and will was properly admitted to probate.

**3. Evidence** ⇨597

The law does not accept speculation, supposition, suspicion, or conjecture as proof.

**4. Wills** ⇨222

A will contest is a separate proceeding from a proceeding for probate of a will.

**5. Wills** ⇨322

In proceeding for contest of a will before probate, contestant was "plaintiff" in the will contest and proponents were in a purely defensive position, and trial judge was concerned with strength or weakness of contestant's case and not with that of proponents who were not called upon to offer any proof until contestant had offered proof which, standing alone, would have warranted a finding that the will had not been duly executed.

See Words and Phrases, Permanent Edition, for all other definitions of "Plaintiff".

**6. Wills** ⇨341

In proceeding for contest of will before probate, in absence of evidence warranting a finding that will had not been duly executed, it was duty of trial court to dismiss the contest and to proceed separately to consider the petition for probate.

**7. Wills** ⇨300

In proceeding for contest of will before probate, contestant could not prevail through weakness of proponent's case, but could succeed only by producing affirmative proof to sustain allegation of non-execution of will.

**8. Wills** ⇨289

In proceeding to contest will before probate, the will bearing signatures of testator and two subscribing witnesses without an attesting clause gave rise to presumption that will had been duly executed and the presumption was "evidence" in the case.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

**9. Wills** ⇨333

In proceeding for contest of will before probate, where proponents moved for judgment against contestant notwithstanding special verdict in her favor, trial judge was entitled to consider all the evidence taken at the trial.

BISHOP, Justice pro tem., dissenting.

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Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Proceeding in the matter of the estate of Abner H. Stone wherein Fannie Bomash filed a contest to instrument offered as decedent's will, opposed by Jerome Stone and others. From an order dismissing the will contest, notwithstanding special verdict for contestant, admitting will to probate and granting letters testamentary, contestant appeals.

Affirmed.

Prior opinion, 133 P.2d 483.

Dudley Robinson, of Los Angeles, for appellant.

Jerry Giesler and Ward Sullivan, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

[1] Fannie Bomash, a sister of Abner H. Stone, deceased, appeals from a judgment dismissing her will contest and admitting the will of said decedent to probate after a jury had rendered a special verdict that the will had not been executed by decedent before subscribing witnesses in the manner prescribed by law. Other grounds

of contest were eliminated by nonsuit. The sole question on the appeal is whether there was evidence which, viewed in the light most favorable to contestant, gave substantial support to the finding of the jury against due execution.

[2] Upon a review of the evidence we have become satisfied that the verdict was without substantial support, and that the circumstances to be hereinafter related and which are all the evidence, direct or indirect, tending to support the verdict, went no further than to justify a suspicion that the subscribing witnesses were not present when the testator signed the will and that they signed it after his death. The will admittedly was signed by the testator and the witnesses; the question as to execution was whether the witnesses had signed in the presence of the testator or after his death.

Jerome Stone, chief beneficiary and one of the executors of the will, was a nephew of decedent and his assistant in the latter's business of dealing in trust deeds. The two, being unmarried, lived together in an apartment and Abner often referred to Jerome as his brother. The will bears the signatures of two persons as witnesses, Celia LeVee, mother of Jerome, and Joseph Loeb, who after the date of the will and before the trial of the contest married one of two sisters, Jerome having married the other. The testimony as to the execution of the will was that Jerome, at Abner's request, called Celia LeVee and Joseph Loeb to come to the apartment of Abner and Jerome on Sunday morning, February 5, 1939. Before their arrival Abner was engaged in writing the will by typewriter, making one carbon impression. He signed the will in the presence of the three persons and asked Celia LeVee and Joseph Loeb to "sign the will which he had just written and signed." A line was drawn by typewriter for the testator's signature, but no lines for those of the witnesses. Loeb wrote the words "Witnessed by" on one of the copies and signed his name, below which Celia signed. Abner signed the other copy also but the witnesses did not. Abner folded both copies and put them in his pocket, from which he then took one, placed it in an envelope (which we shall call No. 1), sealed it, and gave it to Jerome to put in a dresser drawer, which was done. A day or so later Abner gave Jerome another envelope (No. 2), which Jerome placed in a drawer of the dresser under

instructions from Abner to open it in case anything went "haywire" as a result of an operation which Abner was about to undergo. Envelope No. 2 contained instructions to Jerome for Abner's burial, which were dated February 6, one day after the date of the will. Abner later went to the hospital, submitted to the operation and died April 18. Other events described by the witnesses were the following: While in the hospital Abner directed Jerome to get envelope No. 1, which Abner referred to as being marked "Instructions to Jerome Stone," to put it in Jerome's safe deposit box and not to open it until he was told to do so by Widoff, an attorney who was named as the other executor. Envelope No. 2 was opened by Jerome on the evening of Abner's death and was found to contain burial instructions. Envelope No. 1, containing the witnessed will, was taken from Jerome's box some days after Abner's death and under circumstances to be hereafter related. This envelope also contained a copy of the burial instructions. Eight days after Abner's death seven of the relatives of decedent, and Widoff, the attorney who had arranged for the opening of the box, gathered at the Farmers & Merchants Bank, where they met an employee of the bank and a deputy county treasurer, and Abner's safe deposit box was opened. The unwitnessed will, which was the original typewritten impression, was taken out and read. Comment was made by the deputy county treasurer that the document was unwitnessed, and he asked whether it should be read, to which Widoff replied that he thought the folks would like to hear it read anyway for what it was worth and he proceeded to read it. After the document was photostated by the bank, Widoff and Jerome went to another room in the bank and received the will from a bank officer, signing a receipt therefor which recited that it was unwitnessed. The officer of the bank testified that when he took the receipt he remarked that the will was unwitnessed and stated that he wondered whether it would be acceptable that way and that either Widoff or Stone said that he didn't think there would be any reason why it wouldn't be accepted. Widoff and Jerome left the bank together and as they walked away they discussed the unwitnessed will and Widoff told Jerome that it was not worth the paper it was written on, whereupon Jerome said that he had seen a witnessed will and that Abner had given him a sealed



envelope with instructions not to open it until Widoff told him to and that he had this envelope in his safe deposit box; Widoff told him to get it immediately and bring it to Widoff's office. The Farmers & Merchants Bank was at Fourth and Main Streets, Jerome's box at Eighth and Broadway. Jerome walked the intervening six blocks, got the envelope out of his box, took it to Widoff's office, where it was opened in the presence of Widoff and one Sidney Stone, who was not a witness in the case. Jerome and Widoff testified that the witnessed will was found in the envelope; it was taken by Jerome, under Widoff's instructions, to the first mentioned bank, where it was photostated. The same afternoon it was filed for probate upon petition of Jerome and Widoff. Jerome and Widoff had left the Farmers & Merchants Bank shortly after noon. Approximately an hour and a half elapsed before Jerome returned to the bank with the witnessed will. In Widoff's office the men had discussed the assets of the estate and the matter of the probate of the will.

The theory of the contestant at the trial, and the one insisted upon here, is that the signatures of the witnesses were subscribed to the will during the hour and a half that intervened while Jerome was going to his safe deposit box and returning to the Farmers & Merchants Bank with the will which bore the signatures. The circumstances upon which appellant relies to support the verdict are the following: That the unwitnessed copy and not the witnessed will was found in Abner's safe deposit box; that Jerome remained silent when the deputy county treasurer remarked that the will was not witnessed; that Jerome made a number of visits to Abner's safe deposit box while the latter was in the hospital and yet testified that he had not seen the unwitnessed document in the box with Abner's other papers; that Jerome testified that Abner put one copy of the will in an envelope and gave it to him and yet later testified that he did not know until he opened the envelope that it contained the will; that he testified that Abner sealed the envelope before giving it to him and yet the envelope containing the will was found to contain a copy of the burial instructions, which were dated one day later than the will. Much importance is attached to the fact that Jerome had an opportunity and a motive to produce a witnessed will. The fact that Jerome at the direction of Widoff had the witnessed will photostated by the

bank is pointed out as a suspicious circumstance indicating a purpose to manufacture evidence. It is also claimed to be a significant fact that the names of the witnesses were not signed with the pen used by Abner. The circumstances that the witnesses were persons who were close to Jerome and that they were called in to witness the will from different parts of the city are said to be extraordinary. In connection with the foregoing facts, minor discrepancies and inconsistencies in the testimony of Jerome and the subscribing witnesses are alluded to.

[3-8] It will be sufficient to preface our discussion of the evidence with the observation that the law does not accept speculation, supposition, or conjecture as proof. In analyzing the evidence we must first of all separate that which tends to give affirmative support to plaintiff's contention that the will was not executed from the evidence which tends to prove that it was duly executed. We must not confuse the will contest with the proceeding for the probate of the will, for they are separate proceedings. The nature of a proceeding for the contest of a will before probate and the rules of procedure applying thereto have been explained so fully by decisions of the Supreme Court as to firmly establish certain rules, which may be stated briefly. Contestant was plaintiff in the will contest; proponents were in a purely defensive position. The trial judge was concerned with the strength or weakness of contestant's case, not with that of proponents. The latter were not called upon to offer any proof at all unless and until contestant had offered proof which, standing alone, would have warranted a finding that the will had not been duly executed. In the absence of such evidence it was the duty of the court to dismiss the contest and to proceed separately to consider the petition for probate. *Estate of Latour*, 1903, 140 Cal. 414, 420, 73 P. 1070, 74 P. 441; *Estate of Relph*, 1923, 192 Cal. 451, 458, 221 P. 361. It follows then that contestant could not prevail through the weakness of proponents' case and merely because the testimony of proponents and their witnesses may have been subject to suspicion or otherwise unsatisfactory; she could succeed only by producing affirmative proof to sustain her allegation of nonexecution. The will itself, bearing the signatures of the testator and two subscribing witnesses, even without the usual attesting

clause, which was not present, gave rise to a presumption that the will had been duly executed, and this presumption was evidence in the case. *Estate of Braue*, 1941, 45 Cal.App.2d 502, 114 P.2d 386; *Estate of Pitcairn*, 1936, 6 Cal.2d 730, 59 P.2d 90.

It is unnecessary to discuss the arguments of appellant which call attention to alleged contradictions and inconsistencies in the testimony of the witnesses Jerome Stone, Celia LeVee, Joseph Loeb, and certain other witnesses whose testimony gave support to that of the witnesses named. If there was anything in the testimony of these witnesses tending in any way to give affirmative support to contestant's claim that the will was not properly executed, it would of course be entitled to the most careful consideration, but there was no such testimony.

Attention may be directed next to certain facts in evidence which are relied upon by appellant but which in our opinion are without probative value to establish nonexecution of the will. The fact that it would have been possible for the witnesses to subscribe their names to the will during the hour and a half interval we have mentioned has, of course, not even slight value as evidence that they did so. There was no evidence whatever that they did witness the will after the death of Abner, and the fact that they had an opportunity to do so proves nothing. Two disinterested witnesses testified that the subscribing witness Loeb was in their butcher shop, and a third witness testified that Mrs. LeVee was in his dental office during the time when they would have had to be with Jerome Stone in order to fabricate the will. Appellant's argument, which is directed to the matter of the weight of the testimony of these witnesses, is beside the point which we are to examine, for if their testimony, which was introduced by proponents, should be disregarded entirely we would have left only the possibility that Loeb and Mrs. LeVee could have been with Jerome Stone, which would furnish no support for the contention that they were with him. And, as we have said, we are not concerned with the alleged weakness of proponents' case.

If there is any fact in the case tending in the slightest degree to warrant an inference of other facts tending to support the allegation of nonexecution, it is that Jerome said nothing to the other relatives

at the meeting in the bank about having seen a witnessed will or having in his possession a sealed envelope which he had received from Abner. When weighed as proof, Jerome's silence will be seen to be wholly without evidentiary value. Plaintiff's argument proceeds somewhat as follows: Jerome overheard the remark of the deputy county treasurer to the effect that the will was not witnessed. He then believed the will to be valid. (This assumption, as we shall see, breaks the chain of appellant's reasoning.) Jerome knew that the other copy of Abner's will was in a sealed envelope and reposing in his safe deposit box. Wherefore, it is argued, if Jerome had had a witnessed will he would have said so, and because he did not say so, he did not have it and therefore the will had not been witnessed during Abner's lifetime but had been subscribed by the witnesses during the hour and a half immediately following the departure of Jerome and Widoff from the Farmers & Merchants Bank. We shall notice first appellant's assumption that Jerome heard the remark of the deputy county treasurer. We refer to it as an assumption and not as an established fact because Jerome did or said nothing to indicate that he had overheard the remark, he testified that he did not recall having heard it, and it would appear from his testimony and from that of the bank officer who was present, who also testified that he did not recall such a remark, that it might have been addressed to Widoff, who replied to it, and then read the will. Appellant's first inference, then, is that because the remark was made, Jerome heard it. The next inference is that Jerome believed the will to be valid until Widoff told him after they had left the bank that it was invalid. Neither Jerome nor anyone else stated the belief that it was valid during the family gathering and there was nothing to indicate what was in Jerome's mind. But this assumption as to Jerome's belief does not aid appellant. It seems to us that if Jerome did believe the unwitnessed will to be valid he was not called upon to say that he had seen or had another one. Appellant's next assumption is that Jerome knew that he had another copy of the will in his safe deposit box and if he had known that to be a witnessed copy he would have told of it after hearing the comment upon the unwitnessed will. His silence in the meeting at the bank was meaningless unless it be assumed as a fact that he either knew

he had a witnessed will in his safe deposit box or was sufficiently sure of it to have felt warranted in stating it to be the fact. The evidence did not establish the fact that Jerome knew he had a copy of the will in his safe deposit box, and the fact of his knowledge would have to be inferred from the circumstances. He undoubtedly believed that envelope No. 1, when he received it from Abner after it had been sealed, did contain a copy of the will, but it must be remembered that he put that envelope in the dresser drawer and that when he opened it in Widoff's office the envelope contained not only the will but also a copy of the burial instructions dated one day after the date of the will and the envelope had been inscribed by Abner "Jerome Stone Instructions." When, at Abner's request, given while he was in the hospital, Jerome took an envelope from the drawer and placed it in his safe deposit box, it was evidently one which Abner had substituted for envelope No. 1 in order to place with the will a copy of the burial instructions. There was no evidence that Jerome knew what was in that envelope until it was opened in Widoff's office within an hour after the family gathering at the Farmers & Merchants Bank. Obviously if Jerome did not know or was in doubt as to what was in the envelope, his silence as to having it in his possession was without significance. He did not tell the relatives that he had the sealed envelope and yet no one questions that he had it. There was no evidence that he had ever read the burial instructions and we can conceive of no reason why he should have discussed with the relatives the fact that there were instructions until he had read them. His failure to mention them was quite natural. And again, we do not see how it can be put aside as unnatural or unreasonable that Jerome may not have wished to discuss the will with the other relatives, especially in the presence of an officer of the bank and a deputy county treasurer. When we have followed appellant through the devious inferences with which she supports her argument, we are confronted by the final fact that Jerome, if he heard the discussion about the will, if he had an opinion as to whether it was valid or invalid, if he knew he had another copy of Abner's will in his own safe deposit box, could reasonably have considered it to be the part of discretion not to discuss it with the assembled relatives. He was the principal beneficiary under the will.

Is it unreasonable to suppose, in view of the contest that later developed, that Jerome considered it the part of discretion to invite no controversy with other members of the family? We know of no established rule or standard of conduct pertaining to such situations under which Jerome's silence upon any assumed state of facts would be unnatural, unreasonable or even suspicious. His indubitably was a discreet silence, as proved by subsequent developments. We cannot characterize his silence under the circumstances, even assuming all of appellant's assumptions and inferences to be warranted, as going further than to raise a faint suspicion that he may not then have had in his possession a duly witnessed will. Whether even that suspicion would be warranted we do not say; suspicion is not a recognized element of proof.

[9] We find no evidence other than that which we have discussed which tends even remotely to support the allegations of contestant that the will was not duly executed. What we have said amply sustains the action of the trial judge in giving judgment against contestant notwithstanding the special verdict in her favor. However, it may not be amiss to go a bit further in justifying that ruling. The trial judge in passing upon the motion for judgment notwithstanding the verdict was entitled to take into consideration all of the evidence at the trial. *Estate of Smethurst*, 1936, 15 Cal.App.2d 322, 330, 59 P.2d 830. Some of the established facts were that Jerome Stone had access to Abner's safe deposit box and undoubtedly enjoyed the affection and confidence of his uncle, that the will expressed the latter's desires with respect to the disposition of his estate, in which Jerome was preferred, that the making of the will was Abner's voluntary act, that his entrusting it to Jerome was not unnatural in view of the fact that the latter was chief beneficiary and one of the executors and had been directed to arrange for Abner's burial, and the further facts that the manner in which the will was alleged to have been executed was a reasonable and natural one and that the testimony regarding its execution was not inconsistent with other proven facts. All of these facts were pertinent to the question the trial judge had to decide, namely, whether Jerome's conduct and the surrounding circumstances warranted a legal inference that proponents and their witnesses were guilty of gross



fraud and perjury and the offering of a false document in evidence. We are unable to point to any direct evidence or any inference from facts in evidence which we could characterize as even slight proof that on February 5, 1939, Abner Stone did not execute his will before witnesses. The court did not err in admitting the will to probate notwithstanding the finding of the jury that it had not been executed with due legal formalities. Had the ruling been otherwise it could not have been sustained on appeal.

The judgment and order are affirmed.

PARKER WOOD, J., concurs.

BISHOP, Justice pro tem. (dissenting).

I dissent. I take my stand with the jury in this case, even though it means that, measured by the majority opinion, mine is not a reasonable mind; that I am not any more able than were the jurors to distinguish between fact and fancy.

The legal principles that govern are neither complicated nor in dispute. The order for the entry of a judgment notwithstanding the verdict should not have been granted unless there was "no evidence of sufficient substantiality to support a verdict in favor of plaintiff" (Estate of Leahy, 1936, 5 Cal.2d 301, 303, 54 P.2d 704, 705, repeating a portion of a quotation in Estate of Lances, 1932, 216 Cal. 397, 400, 14 P.2d 768, respecting the like rule as to a directed verdict). I differ from my learned associates in that I find in the evidence substantial support for the jury's negative answer to this question, which was given them: "Was the alleged will, Exhibit A, on February 5th, 1939, declared by Abner H. Stone to be his will to Joseph Loeb and Celia LeVee and thereupon subscribed by him and upon his request these witnesses each signed as a witness in his presence and in the presence of each other?"

The evidence to support the jury's answer need not be direct; circumstantial evidence suffices, if it meets the test of "reasonable minds." A single thread may be weak, but a number of threads twisted together may support a heavy burden. So it may be with circumstances. "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury." Blank v. Coffin, 1942, 20 Cal. 2d 457, 461, 126 P.2d 868, 870.

Jurors are not compelled to accept or reject all of a witness' testimony; they may accept those portions which appeal to them while rejecting those that they do not believe. People v. Smith, 1940, 15 Cal.2d 640, 648, 104 P.2d 510. The jurors in this case may very well have believed that Abner Stone did, on the date which was an element of the question put to them, typewrite an original and a carbon of that which he thought would become his will. He was accustomed, evidence revealed, to draw his own legal papers, and exhibits A and B, the original and carbon copies of his "will," were each drawn on a letterhead of the Cosmopolitan Hotel of Denver, and bear internal evidence of draftmanship by a layman. He typewrote a line upon which to place his signature, but made no provision for the signature of witnesses. This, of itself, is not of great significance, but it is one of the circumstances which the jury doubtless weighed with other facts.

The copy that was found in Abner's safe deposit box was placed there by Abner, the jury could have determined. Of this there was no direct evidence, but it did not get there by itself and Jerome testified that he did not know of its presence there, so Abner must have placed it there on February 7, the last time he opened his box. Had the carbon copy, through some slip, been witnessed, when the original copy was not, persons not learned in law but versed in the usual propensities of men would expect Abner to seek sanctuary for the carbon copy, not for the unwitnessed original. But it was the original copy, not the "witnessed" carbon copy, that he placed in safety. Nor would it seem natural that Abner, had he a witnessed copy of his will, would insert it in an envelope, marked "Instructions to Jerome Stone," give it to Jerome without revealing its contents but with directions not to open it until someone, who did not know of its existence, told him to.

The jury had Jerome before them on the witness stand. They knew he had been present when Abner prepared the original and carbon copy, Exhibits A and B. If it were true that witnesses had been called in and went through the ceremony of witnessing Abner's will, Jerome knew it. Jerome knew that after the will was witnessed, if it was witnessed, that Abner put both copies in his pocket, then took one out, sealed it in an envelope and had it placed in the drawer of their common bureau.

Was it the witnessed will that was in the drawer, or was that still in Abner's pocket? Jerome must have wondered about this, if one will was witnessed and one was not, but did not know the answer until the next big scene, the opening of the box.

Jerome was present in the group when the original copy was taken out of the box, he remembered that, and he remembered that it was read aloud, but he did not remember, so he testified, that anyone said anything about it having no witnesses. In view of testimony that the three events did take place, that is, the taking of the unwitnessed original copy out of the box, the making of the comment that "Here is a document that seems to be a will but has not witnesses on it. Do you think it ought to be read?" and the reading of the will, and that they followed each other in immediate succession, the jurors were certainly acting within the realm of reason when they concluded it to be a fact that Jerome did hear the comment. Then, after it was read, the one sheet of paper was passed around, from one to another, of those present, and Jerome could see that it was not the will that had been witnessed by his mother and future brother-in-law on February 5.

Is it to be held so surely true, that it can be declared as a matter of law, that the jury could not interpret Jerome's silence, at this moment, as eloquent as a statement on his part that he knew nothing of any will of Abner's having been witnessed? Was the jury unreasoning in concluding that one who had passed through the experience of The Witnessing of the Will, and who had wondered what had become of it, and who attends the ceremony of Opening the Deposit Box, only to find a will without witnesses, resulting in a query as to whether it ought to be read, would naturally, involuntarily, declare, in the family circle gathered there: "This isn't the only will, there is one mama witnessed." Jerome's failure to do the thing that your neighbors would expect him to do, if he knew of a will that had been witnessed, warranted the jury in concluding that he knew of no witnessed will, and consequently that the ceremony of February 5 had not taken place. The right of the jurors, charged with the duty of determining the facts at issue before them, to so conclude, is not to be destroyed by pointing out other reasons to which they might have

ascribed Jerome's silence. The statement in the case of *Estate of Wallace*, 1923, 64 Cal.App. 107, 110, 220 P. 682, 683, that "An inference cannot be said to be established by circumstantial evidence, either in a civil or criminal case, unless the circumstances relied upon are of such a nature and so related to each other that it is the only inference which can fairly or reasonably be drawn from them. If other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced", quoted by respondent, was disapproved by the Supreme Court as it denied a hearing of the case, a fact pointed out in *Robertson v. Weingart*, 1928, 91 Cal.App. 715, 723, 267 P. 741, in *Strock v. Pickwick Stages System*, 1930, 107 Cal.App. 298, 301, 290 P. 482, and in *Lejeune v. General Petroleum Corp.*, 1932, 128 Cal.App. 404, 416, 18 P.2d 429. The correct rule is that stated in *Medico-Dental, etc., Co. v. Horton & Converse*, 1942, 21 Cal.2d 411, 132 P.2d 457, 471: "Where different inferences might fairly and reasonably be deduced from the evidence, the choice made by the trial court, in the absence of an abuse of discretion, is binding on the appeal." See also *Mitchell Camera Corp. v. Fox Film Corp.*, 1937, 8 Cal.2d 192, 197, 64 P.2d 946.

The evidence of the events during the noon hour, following Jerome's disclosure to Widoff that he had an envelope not to be opened until Widoff told him to, fails to prove that the will was witnessed during that period but its failure in this regard does not rob it of its value. The contestant had the heavy burden of proving a negative, that the will was not witnessed on February 5. It was an aid to the contestant in discharging her burden not only to prove facts from which it could be inferred that the will had not been witnessed February 5, but also to prove that it might have been witnessed at a later day. The possibility that it was witnessed that later day is not proof that it was, but it was an aid to the jury in coming to their conclusion, because it proved that the earlier date was not the only possible one.

The trial court should not have substituted his view of the facts for that of the jury; the judgment notwithstanding the verdict should not have been rendered.

Hearing denied; CURTIS and TRAYNOR, JJ., dissenting.

59 Cal.App.2d 152

In re BAUER'S ESTATE.

SARAH DAFT HOME v. HANSEN.

Civ. 13798.

District Court of Appeal, Second District,  
Division 3, California.

June 11, 1943.

Hearing Denied Aug. 9, 1943.

1. Wills ☞15

Statute limiting amount of charitable bequests to "one-third of testator's estate" refers to one-third of the distributable estate, and not one-third of the gross estate. Probate Code, § 41.

See Words and Phrases, Permanent Edition, for all other definitions of "One-Third of Testator's Estate".

2. Wills ☞15

Where state statute restricted amount of charitable bequests to "one-third of testator's estate", but neither state statute nor testatrix' will contained provision authorizing apportionment of federal estate taxes among beneficiaries, federal estate tax was an item to be deducted from gross estate in determining distributable estate and in computing charitable institution's one-third of estate. Probate Code, §§ 2, 41, 1080-1082; 26 U.S.C.A. Int.Rev.Code, §§ 810, 812.

See Words and Phrases, Permanent Edition, for all other definitions of "One-Third of Testator's Estate".

3. Appeal and error ☞110

Order denying motion for new trial is not an appealable order.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceedings in the matter of the estate of Alice B. Bauer, deceased, wherein the Sarah Daft Home filed a petition seeking determination of heirship and determination that it was entitled to the residue of deceased's estate, which petition was contested by Ethelbell M. Hansen. From the judgment, and from an order denying a motion for new trial, the petitioner appeals.

Judgment affirmed and appeal from order dismissed.

Riter & Cowan, of Salt Lake City, Utah, and William Ellis Lady, of Los Angeles, for appellant.

Meserve, Mumper & Hughes, Edwin A. Meserve, and Roy L. Herndon, all of Los Angeles, for respondent.

PARKER WOOD, Justice.

The appeal is from a judgment in a proceeding to determine heirship and from the order denying a motion for a new trial.

Alice Bell Bauer died in Los Angeles on March 11, 1939. The appraised value of her estate was \$241,375.17. Her only heir was an adopted daughter who was also her natural granddaughter. By the provisions of her holographic will, made on November 15, 1927, and admitted to probate on March 31, 1939, the daughter was given \$1, and testatrix's sister and brother were given \$500 each, and the residue of the estate was given to "the old ladies home located in Salt Lak [sic]." The petition for probate of the will alleged there was no institution such as that described in the will as the "old ladies home." Appellant, The Sarah Daft Home of Salt Lake City, filed a petition pursuant to sections 1080, 1081, and 1082 of the Probate Code, and alleged that it was the institution mentioned in the will as the old ladies home of Salt Lake City, Utah, and asked that it be determined that appellant was entitled to the residue of the estate.

The judgment of the trial court was that appellant was a charitable institution within the meaning of section 41 of the Probate Code; and that appellant was "entitled to distribution of one third (1/3rd) of the assets of said estate which shall remain available for distribution after the payment or other discharge of all indebtedness of the estate and all claims against the estate and assets thereof, and after the payment of all costs, charges and expenses of administration; and that respondent Ethelbell M. Hansen is the sole and only heir of said Alice Bell Bauer and will be entitled to distribution of the other two thirds (2/3rds) of the assets of said estate which shall thus remain available for distribution."

Section 41 of the Probate Code provides: "No estate \* \* \* may be bequeathed or devised to any charitable or benevolent society \* \* \* or to any person \* \* \* in trust for charitable uses, by a testator who leaves a \* \* \* descendant \* \* \* who, under \* \* \* the laws of succession, would otherwise have taken the property \* \* \* unless



the will was duly executed at least thirty days before the death of the testator. If so executed \* \* \* such \* \* \* legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his \* \* \* descendant \* \* \* who would otherwise \* \* \* have taken the excess over one-third \* \* \*. All property bequeathed \* \* \* contrary to the provisions of this section shall go to the \* \* \* descendant \* \* \* to the extent that they would have taken said property \* \* \* but for such \* \* \* legacies \* \* \*."

Section 812 of the Internal Revenue Code provides in part that one of the deductions allowed to be made from the gross estate in computing the federal estate tax is the amount of bequests or devises to charitable uses. 26 U.S.C.A. Int. Rev. Code, § 812.

Appellant contends that the federal estate tax should not be deducted before computing the amount of appellant's one-third of the estate. Its argument is that the phrase "one-third of the testator's estate" as used in section 41 of the Probate Code means one-third of the gross estate and not one-third of the distributable estate; and that since the federal estate tax is not computed, under section 812 of the Internal Revenue Code, upon the one-third of the estate given to charity, the effect of deducting the tax before computing appellant's one-third would be to tax appellant's bequest which it asserts is exempt from federal estate tax.

[1] A question arises as to the meaning of the phrase "one-third of the testator's estate" as used in that section, i. e., whether it means one-third of the gross estate or one-third of the distributable estate. Former section 1313 of the Civil Code, insofar as it is material to the present discussion, was substantially the same as section 41 of the Probate Code. In construing the words "one-third of the estate of the testator," as used in former section 1313 of the Civil Code, it was stated in *Re Estate of Hinckley*, 1881, 58 Cal. 457, at page 516: "Our conclusion is that section 1313 of the Civil Code prohibits devises or bequests to charitable uses, of more than one third of that which a testator has power to give, that is, of the property which shall remain after payment of his debts and charges of administration." In *Re Estate of Pearsons*, 1893, 98 Cal. 603, at page 611, 33 P. 451, at page

455, it was said: "The one-third of the estate which may be given to charitable uses is one-third of the distributable assets (In *re Estate of Hinckley*, 58 Cal. 457) \* \* \*." In 5 Cal.Jur. 12, section 8, it was stated: "The one-third which may be left for charity means one-third of the distributable assets after all the fees and charges of administration have been paid, and not one-third of the gross estate."

Appellant refers to a statement in *Re Estate of Henderson*, 1941, 17 Cal.2d 853, at page 862, 112 P.2d 605, at page 610, as follows: "Section 41 of the Probate Code restricts the amount of a charitable bequest to one-third of the testator's estate." In that matter the trial court had restricted the amount of the charitable bequest to one-third of the *residue* of the estate *after deducting the amount of a specific bequest* of \$500. The Supreme Court held that the amount of the specific bequest should not have been deducted before computing the one-third of the estate which was given to charity, and stated further on page 862 of 17 Cal.2d, on page 610 of 112 P.2d: "\* \* \* the cause is remanded to the trial court with instructions to modify its decree by awarding to appellant an amount equal to one-third of the testator's estate \* \* \*."

Appellant argues that the statement in the *Henderson* case that the charity should be awarded "an amount equal to one-third of the testator's estate" meant that the charity was to receive one-third of the gross estate and no deductions "on account of any matter or thing" were to be made; that inasmuch as the *Henderson* case was decided after the adoption of the Probate Code and the present section 41 thereof which provides that charity should receive one-third of the estate, the decisions in the *Hinckley* and *Pearsons* cases, *supra*, to the effect that "the one-third of the testator's estate" meant the "distributable estate," should be deemed overruled by the decision in the *Henderson* case.

It is to be noted that section 2 of the Probate Code states: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." As above stated, section 1313 of the Civil Code and section 41 of the Probate Code are substantially the same insofar as they relate to the present matter. The statement in the *Henderson* case that the charity should have an amount equal to "one-third of the testator's estate"

was in substance the language of section 41 of the Probate Code and no definition of the words "one-third of the testator's estate" was given in that case. It does not appear that the Supreme Court intended by that language to give the phrase a meaning different from that announced in its prior decision in the Hinckley case, supra, when the similar language of section 1313 of the Civil Code was construed. That phrase means the distributable estate.

Another question is whether the items to be deducted in determining the amount of the distributable estate include the federal estate tax. In other words, should the one-third of the estate which is given to charity be computed upon the amount of the estate remaining after the payment of costs, charges, and expenses of administration, and before the federal estate tax is deducted? The appeal from the decree is presented upon the assumption that the federal estate tax will be computed under the decree upon the entire estate subject to tax, and will be deducted from the estate otherwise distributable, with the result that appellant's share, consisting of one-third of the residue, will be reduced below what it would be if the tax were deducted wholly from respondent's two-thirds. We shall therefore treat this as one of the questions involved. Appellant argues that since section 812 of the Internal Revenue Code provides that a bequest to charity should be deducted from the gross amount of the estate in order to determine the net value of the estate upon which it will be necessary to pay the federal estate tax, that the portion which appellant, a charitable institution, will be entitled to receive is exempt from the tax; that if the tax is an item to be deducted before the distributable estate is determined, the effect of such a deduction will be that appellant whose bequest is exempt, will be required to pay one-third of the federal estate tax computed on the two-thirds of the estate that respondent will receive; that if respondent had not contended successfully that the bequest to appellant was limited by section 41 of the Probate Code to one-third of the estate, appellant would have taken the whole residuary estate and there would have been no federal estate tax to pay for the reason that appellant's portion would have been exempt from the payment of that tax; that if appellant would not be required to pay a tax if it had taken the whole residuary estate, it should

not be required to pay if it takes only a part of it, and therefore that the tax assessed upon the two-thirds of the residue should be paid out of that portion of the estate and no part of the tax on the two-thirds should be paid out of the one-third of the estate which appellant is entitled to receive.

Section 810 of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 810, provides that: "A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the *transfer* of the net estate of every decedent \* \* \*." (Italics added.)

Section 812 of said Code provides in part that: "For the purpose of the tax the value of the net estate shall be determined \* \* \* by deducting from the value of the gross estate \* \* \* (d) The amount of all bequests \* \* \* to or for the use of any corporation organized and operated \* \* \* for \* \* \* charitable \* \* \* purposes \* \* \*. If the tax imposed by section 810, or any estate \* \* \* taxes, are, *either by the terms of the will, by the law of the jurisdiction under which the estate is administered* \* \* \* payable \* \* \* out of the bequests \* \* \* otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests \* \* \* reduced by the amount of such taxes." (Italics added.)

There was no reference in the will to the payment of federal estate tax from individual bequests or at all. Section 812(d) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 812(d), above referred to, contemplates that federal estate tax may be made payable from individual bequests by the law of the state under which the estate is administered. In the case of *Riggs v. Del Drago*, 1942, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106, 142 A.L.R. 1131, the question was whether a statute of New York which provided that, except as otherwise directed by will, the burden of federal death taxes paid by the executor should be spread proportionately among the beneficiaries, was unconstitutional because it was in conflict with the Internal Revenue Code. The United States Supreme Court said, at page 97 of 317 U.S., at page 110 of 63 S.Ct., 87 L.Ed. 110, 142 A.L.R. 1131: "We are of the opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that

the applicable *state law* as to the devolution of property at death *should govern* the distribution of the remainder and *the ultimate impact* of the federal tax; accordingly, § 124 [the statute under consideration] is not in conflict with the federal estate tax law." (Italics added.) In *Harrison v. Northern Trust Co.*, 1943, 317 U.S. 476, 63 S.Ct. 361, at page 362, 87 L. Ed. 410, it was said: "Section 807 [now part of section 812(d)] recognizes that the ultimate thrust of the federal estate tax is to be determined by state law \* \* \*."

There is no statute in this state which provides that the federal estate tax may be allocated proportionately to the individual beneficiaries. Since there is no provision in the will, or in the state statutes, authorizing the apportionment of the federal estate tax among the beneficiaries, the authority for such apportionment, if any, must be found in the federal statutes. It was said in *Hepburn v. Winthrop*, 1936, 65 App.D.C. 309, 83 F.2d 566, at page 572, 105 A.L.R. 310: "And since, as we have seen, there is no direction in the will and so also no statute dealing with the subject, this brings us back to the federal statute and the necessary implications from its terms."

In *Riggs v. Del Drago*, supra, 317 U.S. 95, 63 S.Ct. 109 at page 110, 87 L.Ed. 110, 142 A.L.R. 1131, the court said in referring to the Internal Revenue Code, section 800 et seq., including section 812 (d), 26 U.S.C.A.Int.Rev.Code: "We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole. \* \* \* In the Act of 1916 Congress turned from the previous century's *inheritance* tax upon the *receipt* of property by survivors [citing cases] to an *estate* tax upon the *transmission* of a statutory 'net estate' by a decedent." In the case of *Young Men's Christian Association v. Davis*, 1924, 264 U.S. 47, 44 S.Ct. 291, 68 L.Ed. 558, the residue of an estate, after specific bequests, was given to a charitable institution and the question was whether the estate tax should be paid from the specific bequests or from the residuary estate. The residuary legatees contended that since the tax was upon the net estate and since the charitable bequests were excluded from the net estate, Congress could not have intended that the tax should be paid out of the very gifts which, by federal statute, were excluded from the net estate and that the purpose of Congress

was to exempt the charitable beneficiaries from the tax. The federal statute then under consideration, Revenue Act of 1918, 40 Stat. 1057, 1096, was substantially the same as the present statute insofar as it related to the present question. The court stated, in an opinion by Chief Justice Taft, 264 U.S. at page 50, 44 S.Ct. at page 292, 68 L.Ed. at page 560: "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death." It was stated further in that case on the same page: "Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific *exemption* of those gifts, but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him: 'If you will make such gifts, we'll reduce your death duties and measure them not by your whole estate, but by that amount, less what you give.'" The court said further, 264 U.S. on page 50, 44 S.Ct. on page 292, 68 L.Ed. on page 560: "There is nothing in subdivision (3) of section 403 which *exempts* the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted. \* \* \*." (Italics added.) In 28 American Jurisprudence 8, section 3, it was stated in referring to the federal estate tax: "It is not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent. It is treated as an expense of administration, as a proper disbursement by an executor \* \* \* for which he will be allowed credit in his account. \* \* \* The tax comes into existence before and is independent of the receipt of the property by the legatee or distributee." The case of *Hepburn v. Winthrop*, supra, 65 App.D.C. 309, 83 F. 2d 566, at page 572, 105 A.L.R. 310, stated in referring to the provision of the Internal Revenue Code that the estate tax was



to be paid before distribution: "This implies that the tax is of the nature of an administration expense. \* \* \* It is therefore not a payment as to which the beneficiaries have any concern. It is not a charge against either legatees or distributees."

A recent United States Supreme Court case, which illustrates the application of the rule that a bequest to a charitable institution is not exempt from the federal estate tax, is *Harrison v. Northern Trust Co.*, supra, 317 U.S. 476, 63 S.Ct. 361, 87 L.Ed. 407. In that case the testator, a resident of Illinois, gave the residue of his estate to four charitable organizations. The will had no provision as to payment of the estate tax, except as to certain specific bequests. The residuary estate, before paying federal estate taxes, amounted to \$463,103.08. The residuary legatees claimed that all of said amount should be deducted from the gross estate in computing the estate tax. The question was whether, under the provisions of section 807 (d) of the Revenue Act of 1932 [now part of sec. 812 (d) of the Internal Revenue Code, 26 U.S.C.A.Int. Rev.Code § 812 (d)], the amount to be deducted from the gross estate on account of the bequest to charity was the actual amount of such bequest, after payment of federal estate taxes, or what would have been the amount if there had not been such taxes. That section of the Revenue Act provided that where the tax is, either under the will or the applicable local law, "payable \* \* \* out of the bequests \* \* \* under this paragraph [to charity], then the amount deductible \* \* \* shall be the amount of such bequests \* \* \* reduced by the amount of such taxes." Apparently the Illinois statutes were silent as to the source from which the tax was to be paid. The court held that only the amount of the residue which was actually distributable to the charitable donees, that is, the amount remaining after payment of the tax, was deductible as a charitable bequest; that the total estate tax was \$459,879.57, which should be paid from the residuary estate, and therefore the charitable donees were entitled to deduct only \$3,223.51, the amount actually passing under the residuary bequests. Those bequests to charity, therefore, were not exempt from the payment of federal estate tax.

[2] The federal estate tax is a charge against the whole estate, is in the nature of an expense of administration, and is one of the items to be deducted from the gross estate in determining the amount of the distributable estate.

[3] The judgment is affirmed. The order denying the motion for a new trial is not an appealable order and the appeal therefrom is dismissed.

SHINN, Acting P. J., and BISHOP, Justice pro tem., concur.



59 Cal.App.2d 161

In re BAUER'S ESTATE.

SARAH DAFT HOME v. HANSEN.

Civ. 13799.

District Court of Appeal, Second District,  
Division 3, California.

June 11, 1943.

Hearing Denied Aug. 9, 1943.

#### 1. Costs ⇨146

Costs are allowable only in actions in which costs are incurred.

#### 2. Costs ⇨148

Where parties entered into stipulation that for purpose of avoiding unnecessary expense, depositions taken for former proceedings for declaratory relief could be used in proceeding to determine heirship, but stipulation did not relate to costs incurred in taking depositions, costs of taking depositions were not taxable in proceeding to determine heirship. Probate Code, §§ 1080-1082.

#### 3. Appeal and error ⇨984(1)

Costs ⇨12

Where motion to strike items from cost bill and affidavits in support thereof presented issue regarding whether amounts were reasonable and items were necessary, determination of issues was matter within trial court's discretion, and, in absence of abuse of discretion, determination would not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceedings in the matter of the estate of Alice B. Bauer, deceased, wherein the Sarah Daft Home filed a petition to determine heirship, opposed by Ethelbell M. Hansen. From an order taxing costs, the Sarah Daft Home appeals.

Affirmed.

Riter & Cowan, of Salt Lake City, Utah, and William Ellis Lady, of Los Angeles, for appellant.

Meserve, Mumper & Hughes, Edwin A. Meserve, and Roy L. Herndon, all of Los Angeles, for respondent.

PARKER WOOD, Justice.

Appellant, the petitioner in a proceeding to determine heirship, was awarded costs. The essential facts in the proceeding, referred to, were stated in an opinion of this Court, relating to that proceeding, filed this day in Matter of Estate of Bauer, 59 Cal. App. 2d 152, 138 P.2d 717. Appellant filed a memorandum of costs in the sum of \$240.50. (The total of the items listed was \$235.50.) Upon a motion by respondent the court taxed costs in the sum of \$50.45, and the appeal is from that order. Prior to commencing the proceeding under sections 1080, 1081 and 1082 of the Probate Code to determine heirship, appellant filed a petition for declaratory relief to obtain a construction of the will. In preparation for the hearing of that petition appellant duly obtained the depositions of certain witnesses. When the matter came on for hearing, respondent's objection to proceeding in that matter, upon the ground that a petition for declaratory relief in a probate proceeding was not proper, was sustained and that matter was dismissed. Appellant then commenced the proceeding under sections 1080, 1081 and 1082 of the Probate Code. The parties entered into a written stipulation which provided among other things that, for the purpose of avoiding unnecessary expense, the depositions taken for the former proceeding could be used in the present proceeding.

Respondent moved to strike from the cost bill the items claimed as expenses in connection with the depositions and based the motion upon the grounds: (1) That costs incurred for depositions in a former action may not be taxed in a subsequent action between the parties even though the depositions were used in the subsequent

action; and (2) that the costs claimed to have been incurred in connection with the depositions were excessive and unreasonable. Counsel for respondent made and filed an affidavit in support of said motion. The affidavit included the facts hereinabove stated relative to taking the depositions in the former proceeding, and stated further that respondent stipulated that said depositions taken in the former proceeding might be used in the present proceeding but there was no stipulation that the cost of taking the depositions might be charged in the present proceeding. The stipulation referred to was attached to the affidavit. The affidavit also alleged upon information and belief that the costs claimed in connection with the depositions were excessive and unreasonable. Counsel for appellant made and filed an affidavit in opposition to the motion and stated that the depositions were obtained for use in the former proceeding and were not used therein but were used in the present proceeding and stated further "that the entering into of the stipulation to use said depositions in said heirship proceeding was for the purpose of avoiding the necessity of taking said depositions again." The affidavit in behalf of appellant also stated that the costs in connection with the depositions were reasonable.

The court disallowed certain items as follows: Witness fees in connection with taking depositions \$23.10; notary fee \$25; certificate \$1; postage \$1.50; stenographic services in preparation of depositions \$116.40; copy of decree in Daft Estate \$2.40; copy of petition to adopt, agreement to adopt, and decree of adoption \$.65; and copy of findings and decree in the Daft Estate \$15. The total of said disallowed items was \$185.05.

Appellant contends that the costs in connection with taking the depositions should not have been disallowed, for the reason that the parties stipulated, as above stated, that the depositions might be used in the present proceeding.

Respondent asserts that the costs in connection with the depositions were not incurred in this proceeding but in the former proceeding and should be disallowed.

[1,2] Costs are allowable only in the action in which the costs are incurred. In the case of *Carlson v. Lantz*, 1929, 208 Cal. 134, 142, 280 P. 531, 534, which included an appeal from an order taxing costs, it was stated: "Item 31 in the sum of \$28 was not incurred in this action, but was incurred

for photographs in the former case ([In re] Estate of Witt, supra [198 Cal. 407, 245 P. 197]), in which case it was properly taxable. The fact that it was not itemized in the former case did not, we think, justify its inclusion in the present case even if the photographs were used herein." The stipulation relative to the use of the depositions in the present proceeding was limited, as stated in the affidavit on behalf of respondent, to a stipulation that the depositions might be offered in evidence, and did not include a stipulation relative to costs incurred in taking them.

The items of costs, which were shown by the cost bill to be in connection with the depositions, were the ones for witness fees and stenographic services in the sums of \$23.10 and \$116.40, respectively.

[3] Respondent's motion to strike from the cost bill, and the affidavit in support thereof, stated also that the amounts of all of the items which were disallowed were excessive and unreasonable; and that the documents relative to the adoption proceedings were not used and were unnecessary. The affidavit on behalf of appellant stated that the amounts were reasonable and that the items were necessary, but it did not state facts to show the reasonableness of the amounts. The record on appeal does not show the materiality or length of the various documents referred to in the items. "If the items appear to be proper charges, a verified memorandum is prima facie evidence that the same were necessarily incurred. *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 P. 536 \* \* \*," *Haydel v. Morton*, 1937, 18 Cal.App.2d 695, 696, 64 P.2d 954, 955. In referring to a similar situation it was stated in *Miller v. Highland Ditch Co.*, 1891, 91 Cal. 103, at page 106, 27 P. 536, 537: "The rule, however, ought not to be extended, and, in our opinion, it should not be applied where the charges do not appear on their face to be proper and necessary. In such cases the burden should be on the claimant, and not on the moving party, and, if he fails to introduce evidence to justify and sustain his charges they should be stricken out on motion." One of the items which does not appear upon its face to be proper is the item of \$25.00 for "notary fee." See also *City of Los Angeles v. Abbott*, 1933, 129 Cal.App. 144, 153, 18 P.2d 785. It was established by the affidavit on behalf of respondent that the items of \$2.40 for a copy

of decree in the Daft Estate, and \$15 for copy of findings and decree in the Daft Estate were included in an agreement between the attorneys for respondent and appellant that they would share equally in the payment of those items, and that respondent paid one-half thereof before the trial. The motion and affidavits presented issues as to whether the amounts were reasonable and the items were necessary. The determination of those issues was a matter within the discretion of the trial court, and, in the absence of an abuse of discretion, such determination should not be disturbed upon appeal. 7 Cal.Jur. 280, sec. 21; *Moss v. Underwriters' Report, Inc.*, 1938, 12 Cal.2d 266, 276, 83 P.2d 503.

The order taxing costs is affirmed.

SHINN, Acting P. J., and BISHOP, Justice pro tem., concur.



59 Cal.App.2d 428

KEISTER v. O'NEIL et al.

No. 12399.

District Court of Appeal, First District,  
Division 1, California.

June 28, 1943.

#### 1. Physicians and surgeons ⇐18(8)

Where hypodermic needle used in administering glucose injection after an appendectomy broke off in plaintiff's thigh, evidence did not establish existence of consequences from unauthorized use of spinal anaesthetic in operation to remove needle, justifying an award against physician.

#### 2. Physicians and surgeons ⇐15

Where hypodermic needle used by physician in administering glucose injection after an appendectomy broke off in plaintiff's thigh, and spinal anaesthetic was used allegedly without authority in operation to remove needle, and plaintiff submitted instruction that she did not complain that her consent was not procured for the operation, plaintiff was not entitled



to damages from physician from use of spinal anaesthetic on any theory that operation was performed without her consent.

### 3. Assault and battery ☞2

#### Physicians and surgeons ☞18(11)

Where hypodermic needle used in administering glucose injection after an appendectomy broke off in plaintiff's thigh and no actual damage was shown from physician's allegedly prohibited use of spinal anaesthetic in operation to remove needle, physician would at most be liable for nominal damages only either for a technical "assault and battery" or for a "breach of contract".

See Words and Phrases, Permanent Edition, for all other definitions of "Assault and Battery" and "Breach of Contract".

### 4. Appeal and error ☞117(1)

A judgment for defendant will not be set aside to permit recovery of nominal damages.

### 5. Physicians and surgeons ☞18(10)

Where second count against physician was for unauthorized use of spinal anaesthetic in operation to remove hypodermic needle which had broken off in plaintiff's left thigh while needle, after an appendectomy, was being used in administering a glucose injection, and third count against physician and hospital was for failure to ascertain location of needle, and jury was extensively instructed regarding giving of the spinal anaesthetic and action was dismissed as to hospital, instructions based on issues raised by third count were not erroneous as withdrawing from jury issues raised by second count.

### 6. Physicians and surgeons ☞18(10)

In action against physician for injuries sustained from alleged unauthorized use of spinal anaesthetic in operation to remove hypodermic needle which had broken off in plaintiff's thigh while needle, after appendectomy, was being used to administer glucose injection, instructions relating to consent to use of spinal anaesthetic were not improper as confusing where, when read together, instructions left it to jury to determine whether such consent was given.

### 7. Physicians and surgeons ☞18(10)

In action against physician for injuries sustained from alleged unauthorized use of spinal anaesthetic in operation to

remove hypodermic needle which had broken off in plaintiff's thigh while needle, after appendectomy, was being used to administer glucose injection, evidence warranted giving of instruction relating to plaintiff's consent to use the spinal anaesthetic.

### 8. Appeal and error ☞215(1)

Where appellant made no attempt to point out wherein instructions were confusing, judgment would not be reversed on ground that instructions were confusing.

### 9. Physicians and surgeons ☞18(10)

In action against physician for injuries sustained from alleged unauthorized use of spinal anaesthetic in operation to remove hypodermic needle which had broken off in plaintiff's thigh while needle, after appendectomy, was being used to administer glucose injection, and for negligence, instruction that whether a doctor had exercised required skill could be determined only from expert testimony was not improper, where instruction related to charge of negligence and plaintiff conceded that there was sufficient consent to operation to remove needle.

### 10. Physicians and surgeons ☞16

Where hospital for benefit of doctor who was to operate secured written authority of minor plaintiff and her husband to operate consenting to administration of necessary or advisable anaesthetics and operations, operating physician could avail himself of the consent for appendectomy performed upon plaintiff.

### 11. Trial ☞260(1)

Where subject of proposed instruction was fully covered in given instruction, proposed instruction was properly refused.

### 12. Physicians and surgeons ☞18(10)

In action against physician for alleged unauthorized use of spinal anaesthetic in operation to remove hypodermic needle which had broken off in plaintiff's thigh while needle, after appendectomy, was being used to administer glucose injection, where plaintiff conceded that she was bound by another's consent to operation to remove needle, plaintiff's proposed instruction that consent to appendectomy would not be a consent to operation to remove needle was properly refused.

### 13. Trial ☞207

In action against physician for alleged unauthorized use of spinal anaesthetic in

operation to remove hypodermic needle which had broken off in plaintiff's thigh while needle, after appendectomy, was being used to administer glucose injection, admission of plaintiff's signed authority to operate consenting to necessary or advisable anaesthetics and operations which authority was signed prior to the appendectomy was not error, where jury was instructed that consent applied only to appendectomy.

#### 14. Witnesses ⇨379(4)

Where written authority signed by plaintiff's husband embodied a consent to administer necessary or advisable anaesthetics to plaintiff, such consent was admissible in impeachment of husband's testimony that he had "made it clear" to physician before he performed appendectomy upon plaintiff that he was not to use a spinal anaesthetic.

#### 15. Trial ⇨89

Answer of plaintiff's husband that plaintiff did not realize what she was doing in response to question as to whether plaintiff was conscious when she signed authority to operate which was signed by husband and which embodied consent to administer necessary or advisable anaesthetics was properly stricken as immaterial, where plaintiff's capacity to sign authority had no bearing upon effect thereof in impeachment of husband's testimony that, before plaintiff's appendectomy, he had made it clear to operating physician that he was not to use a spinal anaesthetic.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Personal injury action by Georgianna Keister, by Doris Keister, her guardian ad litem, against F. H. O'Neil and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Peterson & Ott, of Eureka, and Charles Reagh, of San Francisco, for appellant.

Robert L. Lamb, of San Francisco (A. Dal. Thomson, of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

Plaintiff appeals from an adverse judgment based on the verdict of a jury in an action for damages. There is no claim made that the evidence is insufficient to

support the verdict or judgment, but it is urged that the court erred in giving and refusing to give certain instructions and in ruling on the admissibility of evidence. We are of the opinion that no grounds for reversal have been established.

The parties sued were the respondent, a regularly licensed and practicing physician and surgeon, and a corporation operating a general hospital. The complaint contained three counts, the first of which was directed against the hospital. In substance it was alleged therein that respondent agreed to and did perform an operation on appellant for the removal of her appendix, and that immediately following the completion of the operation the hospital employees, acting under orders from respondent, administered a hypodermic injection of glucose into her body, and in doing so negligently broke off the hypodermic needle in her left thigh; that as a result of the negligence of the hospital employees it became necessary for respondent to remove the needle; that because of the negligence of the hospital employees appellant will suffer great physical pain and mental anguish; "that the negligence and carelessness of the defendant corporation as aforesaid was the proximate cause of the injury to plaintiff," by reason of which she sustained general damages in the sum of \$10,000. The second count was directed against the hospital and respondent. Substantially the same allegations were made against the hospital as were made in the first count, and the basic allegation of the cause of action against respondent was that in operating to remove the needle he used a spinal anaesthetic without the consent of appellant or anyone authorized to act in her behalf, and that the operation left an unsightly and disfiguring scar on her left thigh; and she asked for \$5,000 special and \$10,000 general damages. The third count was directed also against respondent and the hospital. The allegations thereof were that before performing the operation for the removal of the needle respondent and the hospital failed to make a thorough examination to ascertain correctly the location of the broken needle; that as a result of such failure an unsightly and disfiguring scar was left on appellant's left thigh, for which she asked \$5,000 special and \$10,000 general damages.

Respondent and the hospital answered, putting in issue all of the material allegations of the complaint, and the cause was

brought to trial before a jury. However, on the second day of the trial appellant filed a dismissal of the action against the hospital. Thus it will be seen that when the cause was submitted to the jury it was called upon to decide two main issues of fact: First, whether under the second count respondent used a spinal anaesthetic without appellant's consent, and if so, whether any damage resulted therefrom; secondly, whether under the third count respondent before operating to remove the needle failed to make a thorough examination to locate the needle, and if so whether any damage resulted therefrom.

Nowhere does appellant claim that the operation to remove the appendix was not necessary or that it was not skillfully or successfully performed; nor is it claimed that it was not necessary to administer the hypodermic injection following the operation; furthermore, no claim is made that it was not necessary to remove the needle, or that respondent was not authorized to do so. Moreover, all of the points urged for reversal pertain solely to the second count, so that it may be taken as conceded not only that the evidence is sufficient to support the jury's finding as to the third count, but also that no error was committed in the trial of the action with respect thereto. Therefore no further consideration need be given to the charge made therein that respondent failed to make a proper examination to locate the needle before operating to remove it, or that appellant suffered any damage resulting from such alleged failure.

Confining ourselves, therefore, to the second count, the appeal narrows down to these questions: (1) Whether respondent administered the spinal anaesthetic without the consent of appellant or anyone authorized to act for her; (2) if so, whether any damage resulted from the use thereof; (3) whether in the trial of those issues the trial court erred in instructing the jury or in ruling on the admissibility of evidence. The essential facts are these: Appellant was 17 years old, married, and with her husband, aged 19, was living in Eureka with his mother, who is the guardian ad litem herein. On October 11, 1940, after having been married but a week, she was taken ill, and her husband summoned respondent, who made a tentative diagnosis of appendicitis, and directed that if her condition did not improve by midnight she should be taken to the hospital for operation. Early the next morning she was taken to the

hospital by her husband, and there they signed a written "authority to operate" consenting "to the administration of whatever anaesthetics and the performing of whatever operations may be decided to be necessary or advisable \* \* \*"; thereupon respondent successfully operated to remove the appendix, using a general anaesthetic of ethyl chloride and ether. Because of the position of the appendix the operation consumed an unusually long time; and after it was completed, the respondent directed that appellant be given a hypodermaclysis—that is, an injection of normal saline solution, which is injected into each thigh by means of long steel needles attached by tubing to a container of the solution. As was the custom, the hypodermaclysis treatment was administered by a nurse after appellant was taken back to her room from the operating room. A few minutes later the nurse in charge noticed that the fluid was draining too rapidly out of the container. She called assistance, and on further examination it was discovered that the needle in appellant's left thigh had broken off. Respondent was called and informed of the breaking of the needle, and he returned immediately to the hospital. He took X-rays and attempted to remove the needle, but appellant was then coming out of the anaesthetic and he concluded to abandon the attempt for the time being. That night he told appellant's mother-in-law about the needle and the necessity of removing it later. She agreed with respondent that it would be best not to inform appellant of the necessity of another operation, and the following Saturday, a week after the appendectomy, respondent operated to remove the needle, giving the patient a spinal anaesthetic. Additional X-rays were taken first to determine the location of the needle, and with the use of a fluoroscope in the X-ray room and after some difficulty it was found deeply embedded in the muscle beneath the fascia, and was removed. Appellant recovered without any apparent trouble from both operations, and was taken home the following Tuesday.

As to the question of whether the spinal anaesthetic was administered without lawful authority, the evidence is in direct conflict. Appellant's mother-in-law testified that she told respondent on the evening prior to the appendicitis operation that she "absolutely did not want her given a spinal anaesthetic" and that respondent said it



would not be necessary. Appellant's husband testified that he heard his mother's request and that he too stated to the doctor that he was not to use a spinal anaesthetic. The mother also testified that the respondent assured her that it would not be necessary to use a spinal anaesthetic to remove the needle, that he would just give her a shot of novocaine in the thigh. As opposed to the foregoing testimony, respondent denied that there was any discussion of or conversation about anaesthetics before either operation. In this regard he stated that the only remonstrance about the use of a spinal anaesthetic was after the operations when he went to appellant's home to remove the stitches, at which time either appellant or her mother-in-law stated that they would have opposed the use of a spinal anaesthetic had they known it was to be employed. There was also testimony that it would have been inadvisable to give a general anaesthetic to remove the needle because the operation was to be performed under a fluoroscope in the X-ray room, and general anaesthetics being inflammable, there is considerable danger of fire in using them in a room where electrical equipment such as X-ray is being used; also that it was inadvisable to give a general anaesthetic for the further reason that plaintiff had been recently operated on for appendicitis, and such anaesthetics may produce nausea and vomiting, which would cause distention in a fresh wound. Respondent also testified that the operation could not have been performed safely by injecting novocaine locally, because the quantity required would have so affected the tissues as to produce "sloughing" in the field of the operation.

[1-4] In any event, there is no showing whatever of the existence of any consequences from the use of the spinal anaesthetic which would justify an award of damages. Appellant made no attempt at such showing, other than to testify as to her health before the appendectomy and her alleged present physical condition; but she offered no testimony whatever to show that any of the symptoms about which she complained in any way resulted from the use of the spinal anaesthetic; and the testimony is conclusive to the effect that the nature of the anaesthetic had nothing to do with the creation of a scar. She cannot rely on any theory that the operation itself was performed without her consent, because she submitted an instruction, which

was given, to the effect that "the plaintiff does not complain that her personal consent was not procured but has approved the act of her mother-in-law in consenting to such second operation and, therefore, the plaintiff is bound by such consent." Nor as stated did she prove that the scar was in any way the result of the use of the spinal anaesthetic, because all the evidence shows that neither the size of the scar nor the keloid formation could in any way have been attributed to the use of or connected in any way with the anaesthetic. The evidence shows that keloid tissue develops with some persons and not with others, and there is no way of ascertaining in advance whether a person is likely to develop such tissue. Therefore, even taking as true appellant's evidence with regard to the prohibition of the use of a spinal anaesthetic, the defendant would at most be liable for nominal damages only, either for a technical assault and battery, or for a breach of contract, because no actual damage has been shown. And it is well settled that a judgment for a defendant will not be set aside to permit the recovery of nominal damages. *Lund v. Lachman*, 29 Cal.App. 31, 36, 154 P. 295; *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 458, 35 P. 75; *Stewart v. Sefton*, 108 Cal. 197, 210, 41 P. 293; *Schmeltz v. Tracy*, 119 Conn. 492, 177 A. 520.

[5-9] Nor do we find anything in the instructions given or refused which calls for a reversal. The first assignment is directed against a group of three instructions upon the question of negligence, and obviously they were based on the issues raised by the third count, which as stated as to respondent was not dismissed or withdrawn; and there is no claim made that as applied to the third count the instructions were erroneous. It is urged that the effect of those instructions was to withdraw from the jury the issues raised by the second count; but an examination of the record demonstrates that there is no merit in the contention, for it shows that the jury was extensively instructed regarding the matter of the giving of the spinal anaesthetic, including instructions as to the recovery of damages thereunder. The next series of three instructions complained of related to the matter of consent to the use of the spinal anaesthetic. The broad objection is made that there was no evidence to warrant the giving thereof, and that they were confusing.

However, the first two merely embodied abstract principles of law which were correctly stated; and taking the evidence as a whole it cannot be held as a matter of law that the third instruction is unsupported. Read together the three instructions left it to the jury to determine from the conflicting testimony whether such consent was given; and appellant has made no attempt to point out wherein the instructions were confusing. Appellant objects also to an instruction which told the jury that whether the doctor had exercised the degree of skill and care required of him could be determined only from the testimony of experts, "since it is only those learned in the profession who can say what should have been done or that what was done ought not to have been done." Appellant's objection is that it does not require expert testimony to establish that there is no right to operate without consent. The instruction related obviously to the charge of negligence, which it was necessary to prove by expert testimony (*Adams v. Boyce*, 37 Cal.App.2d 541, 99 P.2d 1044); and furthermore, as above pointed out, appellant conceded that there was a sufficient consent to the second operation.

[10-12] Appellant submitted and the court refused to give an instruction which would have authorized the jury to find that the consent signed was a matter between plaintiff and the hospital, of which the doctor could not avail himself unless the hospital was acting as his agent. It is quite plain that the consent was procured by the hospital for the benefit of the doctor who was to operate, and that as a matter of law he could avail himself of it for the first operation. The instruction was properly refused. Appellant next contends that it was error for the court to refuse to give an instruction proposed by her to the effect that a consent to the first operation would not be a consent to the second. The subject was fully covered in appellant's instruction No. 11, which was given to the jury; furthermore, the question of consent to perform the operation to remove the needle was not an issue in

the case, because appellant conceded that her mother-in-law had consented to that operation, and that she was bound by such consent.

[13-15] The assignments of error relating to the trial court's rulings on the admissibility of evidence are likewise without merit. In this regard appellant first contends that it was error to admit in evidence the signed authority to operate, which was signed prior to the appendectomy. Appellant asserts that this authority could apply only to the first operation and not to the second. But the record shows that the jury was instructed that the consent applied only to the first operation. Furthermore, appellant's husband testified that he had "made it clear" to respondent before the appendectomy that defendant was not to use a spinal anaesthetic; whereas the written authority signed by him embodied a consent to administer "whatever anaesthetics \* \* \* may be decided to be necessary or advisable \* \* \*"; therefore such written consent was admissible in impeachment of his testimony. Complaint is made also that the court struck out the husband's answer to a question as to whether appellant was conscious when she signed the consent to operate. The answer was: "Well, I don't think she really realized what she was doing or where she was going at that time. I had to carry her." The answer was stricken on respondent's objection that it was the conclusion of the witness. This question related only to appellant's signature on the consent to the first operation; and the capacity of appellant to sign had no bearing upon the effect of the document in impeachment of the husband's testimony; therefore it was immaterial to any issue relating to the second operation, with which we are here concerned.

For the reasons above stated, the judgment is affirmed; and in accordance with the written waiver filed herein by respondent, no award of costs will be made or entered in his favor.

PETERS, P. J., and WARD, J., concur.

**MALAQUIAS v. NOVO et al.**

Civ. 6854.

District Court of Appeal, Third District,  
(Sacramento), California.

June 16, 1943.

Hearing Denied Aug. 12, 1943.

**1. Appeal and error**  $\S$ 548(1)

On appeal from order denying motion to satisfy judgment against transferee of fraudulent conveyance, in absence of bill of exceptions and endorsement on documents that they had been admitted in evidence, written tender to sheriff of property conveyed and affidavit relating to missing property were not properly before District Court of Appeal.

**2. Appeal and error**  $\S$ 523(2)Judgment  $\S$ 279

On motion to satisfy judgment requiring defendant to turn over to sheriff fraudulently conveyed property, defendant's supporting affidavit and itemized list of property tendered sheriff pursuant to judgment are not part of judgment roll so as to be entitled to consideration on appeal on judgment roll alone. Code Civ.Proc.  $\S$  670.

**3. Appeal and error**  $\S$ 907(3)

On appeal on judgment roll alone from order denying motion to satisfy judgment, District Court of Appeal assumed that order was adequately supported by evidence in every essential respect. Code Civ.Proc.  $\S$  675.

**4. Fraudulent conveyances**  $\S$ 241(2)

Plaintiff in tort action is a "creditor" and authorized to maintain suit to set aside fraudulent sale of merchandise and store fixtures, notwithstanding that his claim may not be reduced to judgment until after equitable suit is commenced. Civ.Code,  $\S\S$  3430, 3439.01, 3440.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor".

**5. Fraudulent conveyances**  $\S$ 47

In suit to set aside transfer of merchandise and store fixtures, where it appeared that there was no compliance with Bulk Sales Law as to publication of notice of sale, court properly found that conveyance was void. Civ.Code,  $\S$  3440.

138 P.2d—46½

**6. Fraudulent conveyances**  $\S$ 181(1)

In creditor's suit to set aside fraudulent conveyance of merchandise and store fixtures, where it appeared that conveyance was void for failure to comply with Bulk Sales Law, title remained in vendor as though no sale had been attempted and intent to actually defraud creditor was immaterial. Civ.Code,  $\S$  3440.

**7. Fraudulent conveyances**  $\S$ 57(3)

A creditor may maintain suit against debtor and his vendee to declare fraudulent sale of merchandise and fixtures void, and to subject property to satisfaction of judgment when transfer leaves debtor bankrupt or without sufficient property to satisfy claim.

**8. Fraudulent conveyances**  $\S$ 314

When vendee knowingly participates in fraudulent conveyance with purpose of defrauding creditors, or wrongfully sells property, or refuses to surrender possession thereof to creditor after sale has been declared void, a personal judgment may be rendered against vendee to compensate creditor for loss sustained.

**9. Appeal and error**  $\S$ 554(3)

In suit to set aside fraudulent conveyance of merchandise and store fixtures made during pendency of tort action against debtor, record, in absence of transcript of the evidence required affirmance of personal judgment against vendee.

**10. Fraudulent conveyances**  $\S$ 316

Where personal judgment was rendered against vendee of fraudulent conveyance and it appeared that vendee had possession of some of the fraudulently conveyed merchandise and fixtures, equity required that recourse be first had by execution to such property before resorting to individual property of vendee.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action in nature of creditor's bill by John Malaquias against Joe F. B. Novo and others to cancel an alleged fraudulent transfer of a stock of merchandise of store fixtures and to subject the property to satisfaction of a former judgment against the vendor. From a judgment for plaintiff and from an order denying motion of defend-



ant Tony Ferreira to set aside plaintiff's judgment, Tony Ferreira appeals.

Affirmed.

Howe, Hibbitt & Johnston, and O. F. Meldon, all of Sacramento, for appellant.

Ralph H. Lewis and Sherman C. Wilke, both of Sacramento, and Blewett & Blewett, of Stockton, for respondent.

THOMPSON, Justice.

The defendant Tony Ferreira has appealed from a judgment which was rendered against him in an equitable action in the nature of a creditor's bill to cancel an alleged fraudulent transfer of a stock of merchandise and store fixtures, under Section 3440 of the Civil Code, and to subject the property to the satisfaction of a former judgment against the vendor in the sum of \$3,887.50. The judgment in this case provides that the vendee, Tony Ferreira, shall, upon demand, forthwith deliver to the sheriff the property in question, and upon failure to do so that judgment for said amount shall be entered against him. An appeal was also taken from an order denying appellant's motion, under Section 675 of the Code of Civil Procedure, to direct the satisfaction of the judgment in this case on the theory that appellant had tendered to the sheriff all of the merchandise and fixtures except certain items valued at the sum of \$437.32, which had been previously sold, and that the last-mentioned sum had been tendered to the sheriff in lieu of the missing property.

The appeals were taken on the judgment roll only. No bill of exceptions was settled or presented. The evidence upon neither the trial nor the motion to satisfy the judgment is before this court.

The defendant, Joe F. B. Novo, owned real property at Ryde, in Sacramento County, upon which he operated a store and a gas station. The stock of merchandise and equipment owned by Novo were of a value in excess of \$4,000. February 12, 1939, Novo made an assault upon the plaintiff which resulted in serious bodily injuries. Suit for damages for the tort was commenced September 19, 1939, and a judgment for \$3,850 and costs in the additional sum of \$37.50 was rendered against Novo on February 6, 1940. On October 11, 1939, prior to the rendering of that judgment, Novo deeded his real property and conveyed his stock of merchandise and equipment to Tony Ferreira, in consideration of

an alleged antecedent debt in the sum of \$6,000. These conveyances left Novo without real or personal property sufficient from which to satisfy the judgment in favor of the plaintiff Malaquias. Tony Ferreira immediately took possession of the store and merchandise and operated the store for a period of time, selling and disposing of some of the stock of goods. This suit was commenced April 11, 1940, against both Novo and Ferreira, to cancel the purported conveyance of personal property as void for failure to publish the notice of sale of goods as required by Section 3440 of the Civil Code, and to subject the personal property to the satisfaction of the judgment subsequently secured in the tort action.

The complaint in this equitable suit alleges that the defendant Joe F. B. Novo transferred to Tony Ferreira "all the real and personal property" leaving him no property from which the plaintiff's judgment could be satisfied. It is also alleged that the conveyances were made to defraud the plaintiff as an existing creditor, and to prevent him from satisfying his judgment or any part thereof.

The court found that Novo conveyed all of his real and personal property to Ferreira to defraud creditors; that at the time of the conveyance the plaintiff was a creditor of Novo, a judgment in the former action having been rendered in his favor in the sum of \$3,887.50 on February 6, 1940, no part of which had been paid; that the conveyance of merchandise and store equipment is "conclusively presumed to be fraudulent and void" for failure to publish notice of the sale as required by Section 3440 of the Civil Code; that the value of the stock of merchandise and store fixtures amounted to an aggregate sum in excess of \$4,000; that Tony Ferreira immediately took possession of the stock of merchandise and continued to operate the store after this suit was commenced until July 12, 1940; that on the last-mentioned date Ferreira levied an attachment on the said property, and the Constable of Georgiana Township, Sacramento County, took and retained possession thereof. The court further found that at the time of the conveyance Novo was indebted to Ferreira in the sum of \$6,000, and that the transfer of property was not made without consideration or with the "actual intent to hinder, delay or defraud the creditors."

Judgment was rendered against Ferreira February 20, 1941, to the effect that he

should "forthwith deliver to the Sheriff of the County of Sacramento the stock in trade and fixtures, and the whole thereof" to satisfy plaintiff's former judgment against Novo, and that, if "upon demand" he failed to do so the plaintiff would be entitled to recover judgment for the sum of \$3,887.50 against the vendee.

The record shows that plaintiff procured an execution June 10, 1941, which was levied by the sheriff and returned unsatisfied with the exception of the sum of \$544.93 in cash which was recovered in garnishment from the Bank of Alex Brown at Walnut Grove, which sum was credited on the judgment. The balance of the judgment remains unpaid.

On June 14, 1941, the appellant served on the sheriff notice of tender of delivery of the stock of merchandise, except certain items thereof which were previously sold by Ferreira for the aggregate sum of \$437.32, which sum he also offered to pay. This cash, however, was not deposited in a bank as required by Section 1500 of the Civil Code.

The appellant then moved the court under Section 675 of the Code of Civil Procedure to require the satisfaction of the judgment on the theory that it was deemed to have been fully paid by the tender heretofore mentioned. That section reads in part: "Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it."

[1] The record contains copies of the written tender of merchandise and fixtures, together with an itemized list of the property and an affidavit of the appellant averring that certain articles were not in his possession, but that the missing property had been sold, consisting of specified items of the aggregate value of \$437.32, according to inventoried prices thereof. None of those documents was endorsed as read in evidence upon that motion. They are not authenticated as a part of that proceeding. No bill of exceptions of that hearing was presented or settled. The evidence is not properly before this court for consideration.

[2,3] Neither the affidavit of Ferreira nor the itemized lists of merchandise and fixtures, which were apparently used on that motion, are a part of the judgment

roll. (Sec. 670, C.C.P.) Since the evidence adduced at the hearing of that motion is not properly authenticated nor before us on appeal we must assume the order denying the motion is adequately supported in every essential respect. *State Bank of Lansing v. McLaury*, 175 Cal. 31, 165 P. 7; *Adjustment Corporation v. Hollywood Hardware & Paint Co.*, 35 Cal.App.2d 566, 96 P.2d 161; *E. A. Strout Western Realty Agency, Inc. v. McCloud*, 29 Cal.App.2d 400, 84 P.2d 533; *Rubenstein v. Bank of America, etc.*, 29 Cal.App.2d 501, 84 P.2d 1056; Rule XXIX, Rules for Supreme Court and District Courts of Appeal; 2 Calif.Jur. 526, sec. 263.

The order denying appellant's motion to satisfy the judgment must therefore be held to be supported.

With respect to the appeal from the judgment which was rendered against the appellant for the sum of \$3,887.50, on account of the absence of the evidence we must also assume that it is supported in every necessary essential to render it valid. The court found that the plaintiff was a creditor of Joe F. B. Novo, who owed him said sum of money at the time of the conveyance of the stock of merchandise and fixtures, and that said transfer of personal property was "conclusively presumed to be fraudulent and void."

Section 3440 of the Civil Code provides in part: "The sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, \* \* \* the vendor \* \* \* shall record in the office of the county recorder \* \* \* a notice of said intended sale, \* \* \* and shall publish a copy of such notice in a newspaper of general circulation published in the township \* \* \*."

[4] The California authorities hold that one is deemed to be a creditor and is authorized to maintain an action to set

aside a fraudulent sale of merchandise and store fixtures under the provisions of Section 3440 of the Civil Code, even though his claim which is based on a tort may not be reduced to judgment until after the subsequent equitable suit is commenced. Secs. 3430 and 3439.01, Civil Code; *Adams v. Bell*, 5 Cal.2d 697, 701, 56 P.2d 208; *Chalmers v. Sheehy*, 132 Cal. 459, 465, 64 P. 709, 84 Am.St.Rep. 62; *Meyer v. Thomas*, 37 Cal.App.2d 720, 724, 100 P.2d 360, 1066; *Withrow v. National Surety Co.*, 122 Cal.App. 242, 10 P.2d 83; *Schwartz v. Brandon*, 97 Cal.App. 30, 37, 275 P. 448; 12 Cal.Jur. 977, sec. 19. In the *Chalmers* case, *supra* [132 Cal. 459, 64 P. 712], the court says: "The cases are very numerous where it is held that a cause of action based upon a tort is within the statute against fraudulent conveyances, and that a person having such a cause of action is a creditor of the wrongdoer, before judgment is obtained."

In the present case the assault was committed on the plaintiff by Novo February 12, 1939. Suit for damages resulting from the tort was commenced in September of that year. Judgment for \$3,887.50 was rendered February 6, 1940, in favor of the plaintiff. The fraudulent sale and transfer of merchandise and fixtures was made to the appellant Ferreira October 11, 1939, prior to the rendering of judgment in the tort suit. Those circumstances constituted the plaintiff a creditor of Novo and authorized him to maintain this action to set aside the purported sale.

[5, 6] The court properly found that the conveyance was void for failure to publish a copy of the notice of sale in a newspaper of general circulation as required by Section 3440 of the Civil Code. Since the sale was made in conflict with the statute and therefore void, it is immaterial whether the parties intended thereby to actually defraud creditors. 12 Cal.Jur. 985, sec. 27. The title to the property remained in the vendor as though no sale had been attempted.

[7] A creditor is authorized to maintain an equitable action against the debtor and his vendee of merchandise and fixtures which are fraudulently conveyed contrary to law, to declare the purported sale void, and to subject the property to the satisfaction of his judgment, when the transfer leaves the debtor bankrupt or without sufficient property to satisfy the claim.

*Henderson v. D. S. Denehy Mercantile Co.*, 48 Cal.App. 41, 191 P. 558; *Wright v. Salzberger*, 121 Cal.App. 639, 645, 9 P. 2d 860; *Bird v. Murphy*, 72 Cal.App. 39, 236 P. 154; *Pedro v. Soares*, 18 Cal.App. 2d 600, 604, 64 P.2d 776; 12 Cal.Jur. 1029, sec. 70. In the text last cited the author says: "He [the creditor] may bring an action in equity to set aside the fraudulent conveyance and subject the property to the satisfaction of his judgment lien, in which case the action is not one on the judgment but it is an equitable one for relief against the obstruction caused by the fraudulent transfer which hinders him in satisfying his claim by the ordinary process of law, or \* \* \* he may bring an action in the nature of a creditor's bill for the purpose of subjecting to the payment of his judgment, the money or property transferred or concealed in fraud of his rights."

[8] When the vendee knowingly participates in the fraudulent conveyance with the purpose or intention of defrauding creditors, or he wrongfully sells or disposes of the property, or refuses to surrender possession thereof to the creditor, after the sale has been declared void, a personal judgment may be rendered against the vendee to compensate the creditor for the loss sustained thereby. *Henderson v. D. S. Denehy Mercantile Co.*, *supra*; *Wright v. Salzberger*, *supra*; *Davis v. Winona Wagon Co.*, 120 Cal. 244, 52 P. 487; *Ohio Electric Car Co. v. Duffet*, 48 Cal.App. 674, 192 P. 298; *Swinford v. Rogers*, 23 Cal. 233; *Pedro v. Soares*, *supra*; 24 Am.Jur. 364, sec. 261.

[9] In the absence of the evidence adduced in this case we must assume there was adequate proof that the property in question was fraudulently conveyed to the appellant and that the transfer was therefore void; that the defendant Novo conveyed to the appellant all of the property, both real and personal, which he possessed, leaving no property from which plaintiff's judgment could be satisfied; that the value of the personal property was in excess of \$4,000, a portion of which had been wrongfully sold by the appellant, and that sometime after the commencement of this action the appellant levied an attachment against the balance of the merchandise and fixtures and placed them in the custody of a constable. So far as the evidence in this case is concerned, in support of the judgment we may assume that the appellant sold all of the property in question under attachment



and converted the proceeds to his own use, or he may have retained the property and refused upon demand to deliver it to the sheriff as required by the judgment. We must assume that the evidence shows that Novo fraudulently conveyed the property to the appellant after the commencement of the tort suit for damages to prevent the plaintiff from satisfying any judgment which he might obtain in that action. We are permitted to make no assumptions in conflict with the findings and judgment in this case.

We therefore conclude that the court was authorized to render judgment against the appellant in the alternate form in which it appears.

[10] Since the judgment in this case is based on the antecedent debt due to the plaintiff from Novo, and the title to the merchandise and fixtures, or at least the unsold portion thereof, remains in the vendor Novo, it seems equitable that recourse should first be had by execution to that property to satisfy the debt before resorting to the individual property of the appellant. 24 Am.Jur. 364, Sec. 261. However that is a mere matter of supplementary proceedings which are not involved on this appeal. It does not affect the validity of this judgment.

The judgment and the order are affirmed.

PEEK, J., and ADAMS, P. J., concur.



59 Cal.App.2d 402

**SCHOLEY v. STEELE et al.**  
Civ. 12363.

District Court of Appeal, First District,  
Division 2, California.  
June 26, 1943.

Hearing Denied Aug. 23, 1943.

**1. Landlord and tenant**  $\S$ 169(6)

In action against landlord for injuries caused by decayed step and railing, evidence warranted finding that landlord had covenanted through his agent to assume repair of premises and negligently failed to make necessary repairs.

**2. Contracts**  $\S$ 170(1)

Where language of contract is open to doubt and parties have adopted and acted upon a particular construction, such construction will be considered as of great weight by the court and will usually be adopted.

**3. Appeal and error**  $\S$ 882(3)

Where appellant established agent's authority to make minor repairs by his own testimony, and objected to offer to prove that particular repairs were minor, appellant could not claim on appeal that such repairs were not minor.

**4. Landlord and tenant**  $\S$ 53(2)

One acquiring leased premises after inception of tenancy took subject to existing lease, in absence of statutory written notice of change of terms of lease. Civ. Code,  $\S$  827.

**5. Landlord and tenant**  $\S$ 167(2)

A landlord's liability for injuries to third party from defect in leased premises was not affected by fact that landlord acquired the property after inception of tenancy, in absence of written notice of change of terms of lease. Civ.Code,  $\S$  827.

**6. Landlord and tenant**  $\S$ 167(3)

A landlord is liable in tort to third party for negligent failure to repair in case of express covenant to repair included in the lease or otherwise supported by consideration, but not in case of statutory duty to repair or promise to repair not supported by consideration. Civ.Code,  $\S\S$  1941, 1942.

**7. Landlord and tenant**  $\S$ 167(8)

Though invitee to leased premises stands in shoes of tenant, this does not mean that tenant's negligence will be imputed to invitee, but only that landlord's duty to invitee is identical with his duty to tenant.

**8. Landlord and tenant**  $\S$ 169(11)

In action by third party against landlord for injuries caused by decayed railing and steps, whether person of ordinary prudence with the tenant's knowledge would continue to use the steps presented a question of fact for trial court.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Ethel M. Scholey against Marshall Steele and others for injuries suffered because of defect in step and railing. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Theodore Hale and Carroll B. Crawford, both of San Francisco, for appellant.

Myron Harris and William H. Older, both of Oakland, H. W. Brunk, of Berkeley, and John Jewett Earle, of Oakland, for respondent.

DOOLING, Justice pro tem.

Defendant Marshall Steele, Jr., appeals from a judgment for \$500 rendered against him for personal injuries suffered by the plaintiff. The plaintiff's injuries were caused by a fall from the front steps of a dwelling house of which appellant is the owner and Mrs. Mary Enos the tenant under a month to month tenancy. The fall was caused by the giving way of a decayed step and railing. The trial court found that as one of the terms of the tenancy appellant had covenanted through his agent E. E. Webster, Inc., to assume the ordinary upkeep, maintenance and repair of the premises and that he knowingly, negligently and carelessly failed and neglected to make ordinary and necessary repairs to the steps.

This finding is attacked as being without support in the evidence. The tenant testified that when she first rented the premises through E. E. Webster, Inc., she was told "that they would repair it whenever it should need anything"; that subsequently at her request the roof, drain board, wash trays, pipes, lavatories, sink, garage and windows had been repaired from time to time; and that she had requested E. E. Webster, Inc., to repair the steps and railing on several occasions and they had promised to do so. The house at the beginning of the tenancy was not owned by appellant but when he acquired it in 1936 the month to month tenancy was not interrupted and E. E. Webster, Inc., as real estate agent, continued to look after the premises and collect the rents as before. Appellant gave the following testimony:

"Q. Mr. Webster (of E. E. Webster, Inc.) was authorized to make whatever repairs were necessary, isn't that correct? A. I have to qualify my answer on him to this extent, any minor repairs, yes; in-

volving a substantial outlay of capital, no, not without my consultation. \* \* \*

"Q. He services that for you and acts as your agent, isn't that correct? A. Yes."

Respondent attempted to prove that these were minor repairs, costing when afterwards made only about \$13. Appellant objected to this proof on the ground that it was incompetent, irrelevant and immaterial and his objection was sustained.

[1, 2] The evidence is sufficient to support the finding attacked. The promise "to repair it whenever it would need any thing" is sufficiently definite to support the finding that the owner covenanted to assume the ordinary upkeep, maintenance and repair of the premises, particularly in view of the subsequent conduct of the landlord in making the repairs shown by the evidence. As said by the Supreme Judicial Court of Massachusetts in *Crowe v. Bixby*, 237 Mass. 249, 129 N.E. 433, 435, in construing a promise "to keep the place in repair and safe to live in. \* \* \* Where the language of a contract is open to doubt and the parties to it have adopted and acted upon a particular construction, such construction will be considered as of great weight by the court and will usually be adopted by it."

[3, 4] The authority of Webster to make minor repairs was established by appellant's own testimony and, after shutting out the offer to prove that the repairs in question were minor, appellant is in no position to claim on this appeal that they were not. The fact that appellant acquired the property after the inception of the tenancy is immaterial. He took it subject to the terms of the existing lease and although it was in his power to change those terms by written notice (Civ.Code, § 827) he did not avail himself of that right.

[5, 6] In giving judgment against the landlord the trial court followed the rule laid down in the Restatement of the Law of Torts, Vol. II, § 357. The law in California is not settled by any controlling decision on the question here involved, whether a landlord who has covenanted to repair the leased premises is liable in tort for negligent failure to do so. There are dicta in *Jessen v. Sweigert*, 66 Cal. 182, 4 P. 1188 and *Runyon v. City of Los Angeles*, 40 Cal.App. 383, 180 P. 837, that "If

the owner had covenanted with her tenant to keep the premises in repair, any one injured by reason of her failure to do so might have maintained an action against her or the tenant."

There is respectable authority pro and contra elsewhere in the courts of this country, the rule announced in § 357, Restatement of Torts being followed in the following cases, among others: *Dean v. Hershowitz*, 119 Conn. 398, 177 A. 262; *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686; *Baum v. Bahn Frei Mut. Bldg. & Loan Ass'n*, 237 Wis. 117, 295 N.W. 14; *Fried v. Burhmann*, 128 Neb. 590, 259 N. W. 512; *Watkins v. Feinberg*, 128 N.J.L. 79, 24 A.2d 198; *Granato v. Howard Sav. Institution*, 120 N.J.L. 94, 198 A. 375.

In the absence of controlling California authority to the contrary our Supreme Court has followed the restatement in *Canfield v. Security-First Nat. Bank*, 13 Cal. 2d 1, 20-31, 87 P.2d 830. See, also, *Speck v. Wylie*, 1 Cal.2d 625, 627, 628, 36 P.2d 618, 95 A.L.R. 760. We are satisfied to do so in this instance.

In so holding we limit ourselves to the case of an express covenant to make the repairs included in the terms of the lease or otherwise supported by consideration. The rule is settled otherwise in this state in the case of the statutory duty to repair under §§ 1941, 1942, Civ.Code (Gately v. Campbell, 124 Cal. 520, 523, 57 P. 567) and in the case of a mere promise to repair unsupported by consideration. *Dor-switt v. Wilson*, 51 Cal.App.2d 623, 125 P. 2d 626.

It is further argued, because of the language used in some of our decisions that an invitee to the premises "stands in the shoes of the tenant, and therefore may recover if the tenant cannot" (*Runyan v. City of Los Angeles*, supra [40 Cal.App. 383, 180 P. 841]), that plaintiff is barred from recovery by Mrs. Enos' negligence.

[7] It may be doubted whether the statement that the invitee stands in the shoes of the tenant is intended to be so sweeping as to impute the tenant's negligence to his invitee. Rather it would seem to be a catch phrase to indicate that the duty owed to the invitee by the landlord is identical with the duty owed by him to the tenant. The Supreme Court of Connecticut expressed this view in *Webel v. Yale University*, 125 Conn. 515, 7 A.2d 215, at page 217, 123 A.L.R. 863, saying:

"\* \* \* it certainly is not just to charge one who visits the premises at the invitation of the tenant with the knowledge which the tenant has or with which he is chargeable when the invitee may have neither actual notice nor, upon the facts known or reasonably observable by him, be chargeable with notice."

[8] Furthermore, even if the doctrine of imputed negligence is applicable, it would still present a question of fact for the trial court as to whether a person of ordinary prudence with the tenant's knowledge would continue to use the steps. *Watkins v. Feinburg*, supra, 24 A.2d 198; *Baum v. Bahn Frei Mut. Bldg. & Loan Ass'n*, supra, 295 N.W. 14, 17; *Finch v. Willmott*, 107 Cal.App. 662, 290 P. 660; Restatement of the Law Torts, Vol. II, § 360, Illustration 2.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.



59 Cal.App.2d 413

**CHANNEY v. LOS ANGELES COUNTY  
PEACE OFFICERS' RETIREMENT  
BOARD et al.**  
Civ. 14057.

District Court of Appeal, Second District,  
Division 2, California.

June 26, 1943.

Hearing Denied Aug. 23, 1943.

**I. Statutes** ⚡263

Statutes are to be given prospective effect and not retrospective effect unless latter effect is made compulsory by language of statute.

**2. Counties** ⚡69(3)

The word "may" in amendment to peace officers' retirement system act providing that member may elect to receive actuarial equivalent of pension in lesser pension payable throughout his life and that of his widow, is used in its permissive sense, and effect of amendment is merely to afford members who had previously retired option of accepting benefits provided by act as



amended or retaining their rights under act as it read at time of their retirement. St. 1941, pp. 2271-2273, §§ 11, 11.5.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

### 3. Constitutional law ☞102(2)

Under peace officers' retirement system act, retired officer's wife had no "vested right" in pension until death of the officer. St.1931, p. 477, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

### 4. Counties ☞69(3)

Where at time of retirement of peace officer the peace officers' retirement system act made provision for pension for officer's widow, but such provision had been deleted prior to officer's death, the widow was entitled to a widow's pension. St.1931, p. 477 as amended; St.1941, pp. 2271-2273, §§ 11, 11.5.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Gladys Beatrice Chaney against the Los Angeles County Peace Officers' Retirement Board, also known as Board of Retirement Commissioners of Los Angeles, State of California, and another, for a writ of mandate directing payment of a pension to the petitioner. From a decree granting writ of mandate, the defendants appeal.

Affirmed.

J. H. O'Connor, County Counsel, Beach Vasey, Deputy County Counsel, and Edward H. Gaylord, Deputy County Counsel, all of Los Angeles, for appellants.

Francis A. Cochran, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal, on the judgment roll alone, from a decree granting a writ of mandate directing payment to petitioner of a pension of \$75 per month as the widow of Albert G. Chaney who had been retired on a pension pursuant to the provisions of Act 5848 of Deering's General Laws, Chapter 268, page 477, Statutes of 1931, as amended, which Act will hereinafter be referred to as "the act". This Act provides for peace officers' retirement system in every county which, by ordinance passed by

a four-fifths vote of the Board of Supervisors, accepts the provisions of the Act.

The essential facts are:

On July 1, 1927, Albert G. Chaney was employed by the County of Los Angeles as a county peace officer as defined in the Act. On February 13, 1934, the Board of Supervisors of Los Angeles County passed, by a four-fifths vote, an ordinance accepting and adopting the provisions of the Act. On August 27, 1937, section 11 of the Act was amended to provide, among other things: "Whenever any member shall be killed, or die, \* \* \* after retirement, or while eligible to retirement on account of years of service then an annual pension shall be paid in equal monthly installments to his widow \* \* \* in the sum of \$75 per month. \* \* \*" (Chapter 303, page 664, Statutes of 1937.)

On December 1, 1939, Mr. Chaney was retired pursuant to the provisions of the Act. On September 13, 1941, the Act was again amended including section 11 thereto, so as to delete that part of section 11 quoted above which made provision for widow's pensions. (Chapter 745, pages 2264, 2271 and 2272 of the Statutes of 1941.) There was added at the same time to the Act a new section 11.5 which read thus:

"At any time before the first payment on account of any pension is made, or within 60 days after the effective date of this section, a member or beneficiary may elect to receive the actuarial equivalent at that time of his pension in a lesser pension payable throughout his life and that of his widow, if she survives him, in accordance with one or the other of the following options:

"Option 1: Upon his death, such lesser pension shall be continued throughout the life of and paid to his widow.

"Option 2: Upon his death one-half of such lesser pension shall be continued throughout the life of and paid to his widow." (Sic. Chapter 745, page 2264 et seq. of the Statutes of 1941.)

At the date of his death, and for five years prior to his retirement, petitioner was the lawful wife of Mr. Chaney and she has not remarried.

On March 16, 1943, the Board of Retirement rejected petitioner's application for a pension, whereupon petitioner instituted the present proceeding.

This is the sole question necessary for us to determine:

*Is petitioner entitled to a widow's pension under the provision in section 11 of the Act as it read on December 1, 1939, the date her husband retired, but which provision in section 11 of the Act was deleted prior to the date of his death, November 2, 1941?*

[1] This question must be answered in the affirmative and is governed by this rule:

Statutes are to be given prospective effect and not retrospective effect, unless the latter effect is made compulsory by the very language of the statute itself. (*Vanderbilt v. All Persons*, etc., 163 Cal. 507, 513, 126 P. 158; *O'Dea v. Cook*, 176 Cal. 659, 662, 169 P. 366; see, also, *Sweesy v. Los Angeles*, etc., Retirement Board, 17 Cal.2d 356, 361, 110 P.2d 37.)

Appellants (respondents in the superior court) contend that section 11.5 of the Act quoted above shows an intention upon the part of the legislature to make the 1941 amendments to the Act retrospective as well as prospective, and stress the words in the quoted section providing that "within 60 days after the effective date of this section, a member or beneficiary may elect" to accept one of the "options" provided in the Act.

[2] We are of the opinion that the use of the word "may" in such section was used in its permissive sense (*Ostrander v. City of Richmond*, 155 Cal. 468, 470, 101 P. 452), and that the effect of the section was merely to afford members who had retired prior to the 1941 amendment the option of accepting the benefits provided by the Act as amended or retaining their rights under the Act as it read at the date of their retirement.

Authorities of other jurisdictions cited by appellants are not of assistance in the instant case in view of the decisions of our own courts upon the points here involved. (See *Jones v. Cooney*, 82 Cal.App. 265, 268, 255 P. 536.) Neither is the case of *Jordon v. Retirement Board*, 35 Cal.App.2d 653, 96 P.2d 973, in point, for the reason that such case is factually distinguishable from the present case. In *Jordon v. Retirement Board* the statute upon which the petitioner predicated her rights had been repealed prior to the time her inchoate right had ripened into a choate right, that is, prior to the date of the death of her husband. In the present case the statute upon which peti-

tioner predicates her rights had not been repealed, but had been merely amended. (See *Sweesy v. Los Angeles*, etc., Retirement Board, supra, 17 Cal.2d 361 et seq., 110 P.2d 37.) Since in the present case there is nothing in the Act as amended to require the conclusion that the amendments were designed to apply to past rights, vested or inchoate, which might thereafter, upon the death of an officer who had been retired at the date of the 1941 amendment, result in a pension right to his widow, the reasonable construction of the Act under the rule of law above stated is that such amendment was intended to apply only to cases arising in the future.

The facts of the instant case are analogous to those in *O'Dea v. Cook*, supra, and the principle of law is identical. So nearly are the cases identical that the language used by Mr. Justice Henshaw in the *O'Dea* case may be paraphrased and applied to the instant case thus:

[3, 4] In this case nothing in the Act forces the conclusion that it was designed to apply to past rights, vested or inchoate, which thereafter might, upon the officer's death, result in a pension right to his widow. Its reasonable construction under the rule of interpretation above given is that it was designed to apply to cases arising in the future. It therefore does not dispose of the matter to say merely that respondent had no vested right in the pension until death. True, Mrs. Chaney had no vested right. True, she could secure no widow's pension at all unless the death of Mr. Chaney occurred as contemplated by the statute, but from the very moment that her husband, Mr. Chaney, was retired, she had a right, springing from the fact of his retirement, to the pension, if and when death ensued, and that right, since we are not compelled to give the amendment to section 11, adopted in 1941, a retrospective effect, was a right existing and continuing to exist under the unamended law.

In view of the conclusions which we have reached it is unnecessary to discuss other arguments presented by counsel.

For the foregoing reasons, the decree is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.

59 Cal.App.2d 313

**PEOPLE v. BIER.****Cr. 2254.**

District Court of Appeal, First District,  
Division 1, California.

June 24, 1943.

**1. Rape ☞53(2)**

Evidence sustained conviction of assault with intent to commit rape. Pen. Code, § 220.

**2. Criminal law ☞260(1)**

A judgment of conviction entered by trial court sitting without a jury on conflicting evidence should not be disturbed by reviewing court.

**3. Criminal law ☞111(5)**

A judgment of conviction of assault with intent to commit rape was not erroneous because reporter's transcript showed that accused was convicted of attempt to commit rape, since formal decision and commitment which showed that accused was convicted of assault with intent to commit rape would be deemed controlling on theory that in absence of proof to the contrary it should be assumed the clerk's duty was properly performed. Pen. Code, § 220.

**4. Criminal law ☞1202(2, 6)**

Under statute relating to notification to prison authorities of criminal history of person convicted, upon which his term and place of confinement should be fixed, if alleged servitude is denied, it should be proved, but if it is admitted a recital of admitted facts is sufficient. Pen.Code, §§ 2023, 3024, 3045.

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Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Edward Ernest Bier was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

Edward Ernest Bier, in pro. per.

Robert W. Kenny, Atty. Gen., State of Cal., and David K. Lener, Deputy Atty. Gen., State of Cal., for respondent.

WARD, Justice.

An appeal from the judgment and from the order denying a motion for a new trial.

The information alleged an assault with intent to commit rape; also a prior conviction of rape in pursuance of which conviction defendant had served a term in a penal institution. A jury was waived and the case heard by the court.

The complainant, married, and the mother of a nineteen months old baby, testified that on the morning of the date alleged in the information defendant drove an automobile to the rear of her home and "asked me if my husband were at home, and I said no, that he was at work, and then he told me that he had been talking with my husband about the old car we had in the yard and that he said that he had it for sale. He was driving by and he thought he would like to see it. I said 'You go ahead and take a look at it.' So he went up to the car just a few feet away. I walked over to the car with him. \* \* \* I walked back to the house and he came back and was standing there, and I said 'Why don't you go down where my husband works and ask him about the car, if there was some question about it?' He said, well, he was going into Oakland and he didn't want to stop that morning, and he said 'Let me have a piece of paper and pencil and I will write him a note.' I said 'Wait just a minute' and I went into the house. \* \* \* I opened the door and slammed the door behind me. I went into the kitchen and then into the dining room to get the paper and pencil. I didn't hear him come in. Just as I turned around I heard him. He was about six feet behind me. \* \* \* I turned half way around. I said 'Here is your paper and pencil.' He said 'I don't want the paper and pencil.' He grabbed me around the waist with both arms. I immediately resisted. I told him to let go of me. He grabbed me around the neck with the crook of his arm and then he grabbed me with both hands on my throat and started to choke me. \* \* \* We struggled from the dining room across the living room floor and I tried to scream. I did scream. Every time I made any noise he held his hand over my mouth and hit me and he threatened to knock me out if I didn't stop screaming. The front door was open and I told the dog to bark. I also told him [defendant] I was menstruating. He didn't seem to hear anything I said. He kept threatening to knock me completely out if I didn't stop hollering. \* \* \* I scratched him on the face at that time.



\* \* \* He was trying to drag me into the bedroom. The door was open and I got away from him just slightly and was trying to get out of the front door. He reached over and let me go for just a second and slammed the front door and then I got away from him just far enough to go back in the dining room, near the archway between the living room and dining room, and I had both my arms around his waist and scratched him in the back. \* \* \* He had his hand against my chin, forcing my head back. I had to let go, because he hit me on the jaw and then I was knocked on to the chesterfield, with my face down, my stomach down on the chesterfield. He had his stomach to my back. \* \* \* The last time he hit me it stunned me slightly. He asked me if I was going to yell any more. If I did he would knock me out again. I told him I would be quiet and then he had to catch his breath a second or two. At that time I told him I was menstruating and he said 'You are?' And my clothes of course were disarranged and my shorts were torn and my underclothes were torn and the sanitary belt and pad I had on was loose and he said 'Let me see,' and he looked at the pad then. \* \* \* Then he got up and he and I fought. We were standing right before the big mirror in the living room and he seemed pretty disturbed. \* \* \* I looked at the mirror. I said 'You almost killed me.' He put his hands to his face and said 'Well, you scratched me.' I tried to get him to go. I told him if he would just leave the house I would not call anyone, I would not do anything. I asked him just to get out of the house. He was going to go and then he grabbed me a second time and put his arms around my waist. I told him over again I was menstruating and then I told him I had to have a drink of water, but the thing was I wanted to get out in the kitchen and he insisted I go and get a drink while he watched me. He was watching the outside door. So I got a drink. He made me stand in the middle of the house between the living room and dining room, so he could leave, and finally when he came back about three times to see that I was still standing there, when he finally went I heard the back door slam. I knew he was in his car. All I had to do was to look out of the dining room window and I had a clear view of the license number which I took and wrote down."

Complainant reported the occurrence immediately to the sheriff, and defendant was

arrested several hours thereafter at his home. An automobile of the identical type and registration number reported by the complainant was found on the premises.

On the trial the defense was an alibi, the establishment of which was of course passed upon by the court. On appeal it is contended that "the evidence does not show that there was an intent to commit rape"; that "The evidence adduced at the trial shows that the offense of Battery was committed."

[1,2] It should be noted that certain inconsistencies on relatively minor matters appear in the cross examination of the complainant, and that these inconsistencies are emphasized by reference to the transcript of the preliminary examination. Excerpts from the testimony are selected with extreme care and it is argued therefrom that because defendant did not attempt to kiss complainant and did not ask her to engage in sexual intercourse, etc., there was no intent to commit rape. The testimony of the complainant is not incredible. On the contrary, her story and the surrounding circumstances must have conclusively convinced the trial court that the assault was with intent to rape and not for the purpose of committing mayhem, robbery, grand theft or even the infamous crime against nature (Penal Code, sec. 220). The contention that the assault occurred with intent to commit the last-mentioned offense seems to be presented seriously. This contention may be reiterated by appellant, now in a penal institution, who appeared on appeal in propria persona, but hardly by the "inmate attorney" who, the record discloses, assisted in the preparation of appellant's briefs. The above evidence has been quoted because of the various contentions. The facts are similar to those in *People v. Moore*, 155 Cal. 237, 100 P. 688; *People v. Welsh*, 7 Cal.2d 209, 60 P.2d 124; *People v. Parker*, 74 Cal.App. 540, 241 P. 401, and the evidence amply supports the judgment rendered by the trial court, which should not be disturbed by a reviewing court. *People v. Johnson*, 46 Cal.App.2d 63, 115 P.2d 605; *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467; *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Stangler*, 18 Cal.2d 688, 117 P.2d 321.

[3] It is contended that the judgment is erroneous since the charge in the information is designated as assault with intent to commit rape, a violation of section

220 of the Penal Code, and the reporter's transcript reads as follows: "In the case of the People v. Edward Ernest Bier, it is the decision of the Court that the defendant is guilty of the offense charged in the information, to-wit, Violation of Section 220 of the Penal Code—attempt to commit rape." The minute records of the court show that "The Court in the above entitled cause, finds the Defendant guilty of the crime of felony, to-wit; a violation of Section 220 Penal Code, as charged in the information." The "Decision of the Court," over the signature of the trial judge is set forth in the exact language of the minutes. In the arraignment for judgment the offense in several instances is referred to as an "assault with intent to commit rape, a violation of section 220 of the Penal Code." The commitment refers to "the crime of felony, to-wit: a violation of section 220 of the Penal Code (assault with intent to commit rape)" and thereafter as "a violation of section 220 of the Penal Code, as charged in the information." The use of the words in the reporter's transcript is undoubtedly error. The true designation of the offense is set forth in the minutes of the commitment, etc. Under the circumstances the formal decision and the commitment must be deemed controlling upon the theory that in the absence of proof to the contrary it should be assumed the clerk's duty was properly performed. *People v. Sander*, 59 Cal.App. 82, 209 P. 1027; *People v. Riccardi*, 50 Cal. App. 427, 195 P. 448; *People v. Litchman*, 17 Cal.App.2d 252, 61 P.2d 1229.

[4] Appellant was sentenced to the state prison for the term prescribed by law. Penal Code, sec. 1168. He states that under the circumstances he will be deemed a two-term offender without having been adjudged such by the trial court, and urges that the prior conviction should have been dismissed or it should have been adjudged that he had suffered a prior conviction. Reliance is placed upon *People v. Schneider*, 36 Cal.App.2d 292, 98 P.2d 215. In that case the prior conviction was ignored. In the present case appellant concedes that he is in fact guilty of a prior offense, and that upon arraignment he admitted he had suffered a prior conviction as charged in the information. The commitment herein recites the date, the place, the particular felony and the penal institution of his incarceration. We are not here concerned with the habitual criminal

act (Penal Code, sec. 644), but rather with a proper notification to the prison authorities of the criminal history of appellant upon which his term and place of confinement should be fixed in accordance with the law. Penal Code, secs. 3024, 3045, 2023. If alleged servitude is denied, it should be proved, but if it is admitted a recital of the admitted facts is sufficient. *People v. Schneider*, supra; *In re McConnell*, 5 Cal.2d 436, 55 P.2d 205.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.



59 Cal.App.2d 197

**SCHMIDT v. KLIPFEL et ux.**

No. 12398.

District Court of Appeal, First District,  
Division 1, California.

June 15, 1943.

#### 1. Chattel mortgages ⇨256

Primarily the purpose of moratorium statute is to benefit debtors, but in attaining that object creditors should not be placed in position where debtor may avoid just obligation. *St.1939*, pp. 1046, 1047, 1049, 1051, §§ 2, 7, 14, 15, 19, 20.

#### 2. Limitation of actions ⇨112

Moratorium statute providing an extension of time within which action may be brought makes extension of period of limitations applicable to chattel mortgages irrespective of nature of security. *Code Civ.Proc.* §§ 337, 338, 344; *St.1939*, p. 1051, § 20.

#### 3. Chattel mortgages ⇨256

##### Limitation of actions ⇨112

A debtor has no right, under moratorium statute, to demand extension of chattel mortgage not connected with real property but debtor has possibility of obtaining extension by nonaction of creditor and in such event extension of period of limitation is applicable to chattel mortgage, although it is not connected with real property. *Code Civ.Proc.* §§ 337, 338, 344; *St.1939*, p. 1051, §§ 20, 21.

**4. Chattel mortgages ⇐256**

In title of moratorium statute regarding postponement of sales under certain chattel mortgages, the word "certain" refers not to mortgage on chattels attached to real property, but to chattel mortgages that do not come within the statute as listed in section 21. St.1939, p. 1045 and p. 1051, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Certain".

**5. Chattel mortgages ⇐256**

The broad term "chattel mortgage" as used in section of Moratorium Act providing extension of time within which action may be brought could not be modified or limited by other provisions of the act so as to limit extension to chattel mortgage attached to real property, since the language of the statute is unambiguous. St.1939, p. 1051, § 20.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Mortgage".

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action on a note and to foreclose chattel mortgages by Mary M. Schmidt, executrix of the last will and testament of Arno Schmidt, deceased, against Robert Klipfel and wife. From an adverse judgment, defendants appeal.

Affirmed.

Hawkins & Hawkins & Cardozo, of Modesto, for appellants.

G. M. Steele, of Lodi, and Scott Rex, of Stockton, for respondents.

WARD, Justice.

This is an appeal by defendants from a judgment of foreclosure of two chattel mortgages given by them to secure the payment of a promissory note.

On November 6, 1931, the defendants, Robert Klipfel and Christine Klipfel, his wife, executed and delivered to Arno Schmidt their promissory note in the sum of \$1,500, secured by a mortgage of the same date upon certain personal property consisting of printers' tools, machinery and equipment. Thereafter on November 6, 1933, when by its terms the note fell due, Robert Klipfel and Arno Schmidt entered into an agreement extending the time for

payment of the note until November 6, 1936. On January 31, 1936, as further security for its payment, Robert Klipfel executed a second chattel mortgage to Arno Schmidt covering additional printers' equipment. On May 23, 1937, Arno Schmidt died and his wife, plaintiff herein, was duly appointed executrix of his estate. Robert Klipfel made his last payment on the note on September 25, 1940. Thereafter, plaintiff filed this action for judgment upon the note for \$1,453.75 principal, interest of \$151.83, and foreclosure of the mortgages. Defendants demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action in that the alleged cause of action appeared to be barred by the provisions of section 337 of the Code of Civil Procedure. The demurrer was overruled. The defendants answered, pleading as a bar to the action subdivisions 1 and 2 of the same section of the Code of Civil Procedure set up in their demurrer, and in addition sections 338 and 344 of said Code. Upon the trial it was stipulated that none of the property covered by the mortgages was attached to real property, nor does the record disclose that the chattel mortgages were given as additional security for obligations also secured by mortgage or deed of trust on real property. No estoppel to plead the bar of the statute was set up or claimed, the whole issue being whether or not the principal obligation was barred thereby.

The sole question is whether the obligation herein has been barred by the statute of limitations, Code Civ.Proc. sec. 337, subd. 1, or whether the moratorium act of 1939, Stats. 1939, Ch. 86, p. 1045, provides an extension of time within which the action may be brought. Section 20 of this act provides: "Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by chattel mortgage, mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter 1, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter 7 or Chapter 348, Statutes of 1935, or by virtue of the provisions of Chapter 5, Statutes of 1937, or Chapter 167, Statutes of 1937, or any other provision of law, during the period commencing with the effective date



of this act and ending on July 1, 1941, such time is hereby extended so as not to expire until the first day of October, 1941." Unless the broad term "chattel mortgage" used in the above section is modified or limited by other provisions of the act, it includes all chattel mortgages, and a creditor may delay bringing an action and not be barred by the statute of limitations.

Under the moratorium act, upon the petition of the debtor for an order postponing the sale of property under power of sale in a deed of trust or mortgage, sec. 2, the court may grant relief if it finds equitable grounds therefor. The debtor may seek an order postponing sale under a decree of foreclosure, sec. 14, and may petition for an order extending the period of redemption after such sale, sec. 7. A purchaser, under a contract of purchase, may petition for an order postponing foreclosure, termination or forfeiture of his interest, sec. 15. These sections except section 14 apply where the mortgage, deed of trust or contract is "upon real property, or upon chattels attached to real property." Section 14 seems to be confined to real property as it includes no reference to chattels. While the exact words above quoted do not appear in section 19, that section provides that no sale shall be made under any power of sale contained in any chattel mortgage, etc., and is applicable where the chattel mortgage covers "personal property located in and used in connection with the operation of any building located upon real property, or (b) upon any personal property (excluding personal property under lease contract and excluding live stock) which is used in connection with the customary operation of agricultural real property, sale of which real property under any mortgage, deed of trust, or contract of purchase, is postponed by the filing of a petition" etc. In effect no sale under a chattel mortgage shall be made until the real property is sold.

Thus it may be determined that so far as section 20 is concerned as applied to the facts in the present case, a mortgagor may not seek relief under the act. The mortgage did not cover "chattels attached to real property," nor was it given as additional security for an obligation also secured by a mortgage, or deed of trust on real property.

It is suggested that the purpose of a moratorium act is for the exclusive benefit of the debtor; that where the debtor is not permitted to seek relief, the extension

is not available, and that the creditor must institute proceedings within the period set forth in Code Civ.Proc. § 337. This argument is not convincing if section 20 is applicable to all chattel mortgages. The case of *Christina v. McLoughlin*, 18 Cal. App.2d 410, 63 P.2d 1174, is not in point. In that case a moratorium statute—sec. 8 of chapter 7, Stats. of 1935—was in question. The section covered real estate, and the court held that there was no effective date of postponement under that particular section as applied to the facts of that case.

[1] While primarily the purpose of a moratorium statute is to benefit debtors, that this should not be to the injury of creditors is best demonstrated by the holding in *Harris v. Fitting*, 9 Cal.2d 117, 120, 121, 69 P.2d 833, 835, where the court said: "Lastly, appellants urge that, as the Moratorium Law was enacted for the benefit of debtors, not of creditors, it should be applied only in cases where debtors have sought aid thereunder, not in cases such as the present one, where no petition for moratorium relief was filed by the debtor and the creditor was in no way prevented from filing the foreclosure proceeding within the time prescribed by section 337 of the Code of Civil Procedure. From a reading of the act it appears that its intent was to relieve debtors not only in cases where such relief was sought directly, but also in cases where it was afforded indirectly by the act of the creditor in refraining for an extended period from starting foreclosure proceedings. In either case the granting of this relief to the debtor makes necessary an extension of the statute of limitations for the protection of the creditor, and section 19 properly so provides." *Rust v. Hill*, 17 Cal.2d 517, 110 P.2d 657. In *O'Meara v. DeLamater*, 52 Cal.App.2d 665, 668, 126 P.2d 671, 672, the court said: "It is now settled that the provisions of the Moratorium Act serve to extend the period of the statute of limitations whether or not an application for relief is made before the time when the statute would otherwise run. *Harris v. Fitting*, 9 Cal.2d 117, 69 P.2d 833; *Bakersfield, etc., Co. v. J. K. McAlpine, etc., Co.*, 26 Cal.App.2d 444, 79 P.2d 410. Moreover, since the effect of the Moratorium Act is to extend the period during which an action may be brought, the filing of an action during the extended time is sufficient, and it is unnecessary to plead the act as a condition to reliance thereon."

The decisions quoted constitute a sound exposition of the purpose and scope of the statute. A contrary construction would mean that upon the moratorium coming into operation a debtor could extinguish the obligation by merely remaining quiescent.

Moratoria legislation in this state indicates a broadening of lines and a widening of scope. In 1933 it applied to a dwelling house, in which the owner resided, and the land upon which it was situated, Stats.1933, p. 307; to real property improved with a single family dwelling, Stats.1933, pp. 795, 2717; in 1934 to "real property", Stats. 1935, pp. 1, 56. In 1935 there was added "chattels attached to real property", p. 1208. Also in 1935 the first chattel mortgage moratorium was enacted. Stats.1935, pp. 456, 1496. There was further extension in 1937. A section similar to section 19 of the 1939 act appeared. Stats.1937, p. 1549. Under the 1937 act the extension of time of sale under a chattel mortgage was confined to "the provisions of this act." Such a provision does not appear in the 1939 act.

[2] When the acts were combined in 1939, the only provision extending time within which a creditor must bring action was contained in section 20. There is no reference in that section to "chattels attached to real property," etc. The language "any obligation founded upon a written instrument secured by chattel mortgage" is clear, plain, definite and not ambiguous. There seems to be manifested an intent to make the extension of the period of limitation applicable to chattel mortgages irrespective of the nature of the security.

[3] From an examination of the prior moratoria acts as interpreted, particularly in *Harris v. Fitting*, supra, and *O'Meara v. DeLamater*, supra, it is apparent that the legislature intended to extend relief to debtors in two ways. In the first place, debtors were given the direct right, in proper circumstances, to demand extensions on real property mortgages and on mortgages on chattels attached to real property. In the second place, until 1939, debtors were given indirect relief by permitting creditors, without demand from, or agreement with, the debtors, to refrain

from commencing foreclosure proceedings on such mortgages during the extended period. Until section 20 was passed in 1939 this last mentioned benefit was limited to real property mortgages and to mortgages on chattels on real property. By section 20 the legislature extended the scope of this form of indirect relief so as to include all chattel mortgages, except those excluded by section 21. Although a debtor has no right to demand an extension on a chattel mortgage not connected with real property, he now has the possibility of an extension by nonaction on the part of the creditor. It is no answer to say that a willing creditor by agreement could extend this right to his debtor without a statute. In the situation where there are junior liens and the holders thereof will not agree to a postponement, a statutory extension of the time within which the holder of the first lien must sue, such as is contained in section 20, aids the debtor. Section 20 carries out the main purpose of the entire statute, namely, aid to debtors. We conclude that whether the mortgagor applied or was entitled to apply for a postponement is not controlling in determining whether the terms of section 20 include all chattel mortgages.

[4] The act by its title refers to "certain chattel mortgages." We are not convinced that the word "certain" refers to "chattels attached to real property." On the contrary, the exceptions that do not come within the act are listed in section 21.

[5] In adopting respondent's views, we are conforming to the trend indicated in the opinions previously cited; that is, primarily to protect the debtor, but in attaining that object the creditor should not be placed in a position where the debtor may avoid a just obligation. To adopt appellants' view, it would be necessary to judicially legislate the words "attached to real property" and other terms found in other sections into section 20. The unambiguous language of the legislature forbids such interpolation.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

59 Cal.App.2d 322

**CALIFORNIA EMPLOYMENT COMMISSION v. MALM.**

Civ. 12430.

District Court of Appeal, First District,  
Division 2, California.

June 24, 1943.

**1. Evidence**  $\hookrightarrow$ 91

Burden is upon party seeking relief to prove his case, and he cannot depend wholly on defendant's failure to prove his defenses.

**2. Statutes**  $\hookrightarrow$ 190

The section of the Unemployment Insurance Act providing that if an employer without good cause fails timely to pay contributions due under the Act, he shall pay a penalty of 10 per cent or an additional penalty of 15 per cent if his failure to pay is due to intentional fraud, is clear and calls for no judicial interpretation. St.1939, p. 2053, § 45.3.

**3. Taxation**  $\hookrightarrow$ 528½

Under section of the Unemployment Insurance Act providing that a "certificate" attested by the commission shall be prima facie evidence of payment of required contributions, etc., before the certificate may be admitted it must be attested. St.1939, p. 2053, § 45.1.

A "certificate under seal" when invested with legal force and effect is a solemn instrument, and ought to be complete, certain, and final in itself without any collateral addition or commentary. Its very form and character as a certificate presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contained in the body of the instrument, has not this verification and protection. A "certificate" is a written testimony to the truth of any fact; a written declaration legally authenticated; a writing giving assurance that a thing has or has not been done, that an act has or has not been performed. Popularly, the term "certificate" would import a document in which the officer issuing the same purports to state on his own authority that certain acts have been done.

See Words and Phrases, Permanent Edition, for all other definitions of "Certificate" and "Certificate Under Seal".

**4. Taxation**  $\hookrightarrow$ 845

Under section of the Unemployment Insurance Act providing that finding of the commission that there exists no good cause excusing the employer's failure to pay the required contributions, or that employer's failure is due to fraud, shall be prima facie evidence of the existence of such facts, before a penalty may be imposed against the employer either for want of good cause, or for an intentional fraud, there must be a "finding" of the commission. St.1939, p. 2053, § 45.3.

A "finding" is a word in common use implying some sort of judicial or quasi-judicial determination of a disputed state of facts, and is a word which imports the ascertainment of a fact in a judicial proceeding and commonly is applied to the result reached by a judge. A "finding of fact" is a determination by a court found on the evidence of a fact averred by one party and denied by the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding" and "Finding of Fact".

**5. Statutes**  $\hookrightarrow$ 199

Where the word "finding" is used in a statute conferring quasi judicial functions upon an administrative body it implies that the body has conducted some sort of a hearing, or investigation of the facts upon which it may reach a conclusion that those facts are true.

**6. Taxation**  $\hookrightarrow$ 845

Evidence consisting of auditor's copy of matters appearing in books of account did not authorize imposition of penalties against an employer for nonpayment of contributions required under the Unemployment Insurance Act. St.1939, p. 2053, § 45.1.

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Appeal from Superior Court, Merced County; H. L. Shaffer, Judge.

Action by California Employment Commission, formerly Unemployment Reserves Commission, against George Malm, individually, and doing business as Malm & Angle Lumber Company, Limited, for delinquent contributions, interest and penalties under the Unemployment Insurance Act, St.1935, p. 1226, as amended. From that portion of the judgment denying recovery of sums claimed as penalties for



nonpayment of contributions found due, plaintiff appeals.

Affirmed.

Earl Warren, former Atty. Gen., Robert W. Kenny, Atty. Gen., and John J. Dailey, Deputy Atty. Gen. (Maurice P. McCaffrey, Forrest M. Hill, Ralph R. Planteen, and Doris H. Maier, all of Sacramento, of counsel), for appellant.

L. M. Linneman, of Dos Palos, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to collect delinquent contributions, interest and penalties, due under the Unemployment Insurance Act (Stats.1935, p. 1226, Deering's Gen.Laws, Act No. 8780d). Plaintiff had judgment for the contributions found due and for interest and costs. It appeals from the portion of the judgment denying recovery of the sum of \$38.97 claimed as penalties for nonpayment. The appeal is prosecuted upon a clerk's and reporter's transcript which the parties have stipulated may be treated as a bill of exceptions and clerk's transcript.

The appellant rests its cause for reversal on the want of evidence to support the conclusion of the trial court that "good cause existed for excusing defendant from payment of the penalty." The record does not call for an extended review of the evidence. Appellant attached to its complaint an exhibit consisting of two pages of typed figures in columns indicating dates of delinquency, taxable wages, contributions assessed, and penalties assessed. The document was unsigned, unverified and uncertified. At the opening of the trial, counsel for the commission offered a copy of a "certificate" in evidence which, we may assume, was a copy of the document attached to the complaint. But the record does not disclose that the offered document was identified, marked, or received in evidence. Counsel offered to put a witness on the stand to testify to the correctness of the figures, but this evidence was waived. Counsel for respondent thereupon stated that he made three defenses—that one of those listed as an employee was an independent contractor, that certain deductions should be made for use of a privately owned automobile, and that the penalties were unwarranted. Other than the tender of the copy of the "certificate" the appellant made no further proof in relation to the penalties.

138 P.2d—47½

[1] We are thus confronted with the settled rule that when a party seeks relief the burden is upon him to prove his case, and he cannot depend wholly upon the failure of the defendant to prove his defenses.

[2] The provisions of the statute under which this suit is brought are clear and call for no judicial interpretation. Section 45.3 of the Act, St.1939, p. 2053, provides that if an employer "without good cause" fail to pay the contributions at the specified time he "shall pay" a penalty of 10%, or an additional penalty of 15% if his failure to pay "is due to intentional fraud." The section then provides that "*the finding of the commission that there exists no good cause excusing the delinquency, or that the failure of the employer is due to intentional fraud shall be for all purposes prima facie evidence of the existence of such facts.*"

Section 45.1 of the Act, St.1939, p. 2053, provides that "a certificate attested to by the commission \* \* \* shall be prima facie evidence of the payment \* \* \* of the amount of wages \* \* \* of the levy of the contributions; of the delinquency \* \* \*." (Emphasis in both sections ours.)

[3,4] It should be noted that before the certificate may be received in evidence it must be attested, and that before a penalty may be imposed either for want of good cause or for intentional fraud, there must be a finding of the commission to support the penalty. Now a "certificate" has been defined in *Merrell v. Tice*, 104 U.S. 557, 561, 26 L.Ed. 854: "A certificate under seal, when invested with legal force and effect, is a solemn instrument, and ought to be complete, certain, and final in itself, without any collateral addition or commentary. Its very form and character as a certificate presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contained in the body of the instrument, has not this verification and protection." And in *Dolan v. United States*, 8 Cir., 133 F. 440, 449, a certificate is defined as "'a written testimony to the truth of any fact; a written declaration legally authenticated,' \* \* \* as 'a writing giving assurance that a thing has or has not been done, that an act has or has not been performed.' \* \* \* Particularly the term 'certificate' would import a document in which the officer issuing the

same purports to state on his own authority that certain acts have been done."

[5] A "finding" is a word in common use implying some sort of judicial or quasi-judicial determination of a disputed state of facts. In *Maeder Steel Products Co. v. Zanello*, 109 Or. 562, 220 P. 155, 158, it is said: "Finding. A word which imports the ascertainment of a fact in a judicial proceeding, and commonly is applied to the result reached by a judge. \* \* \* Finding of Fact. A determination by a court, found on the evidence of a fact averred by one party and denied by the other. \* \* \*" Where the word is used in a statute conferring quasi-judicial functions upon an administrative body it implies that the body has conducted some sort of a hearing, or investigation of the facts, upon which it may reach the conclusion that those facts are true.

[6] Here we have nothing in the record but the auditor's copy of matters appearing in the books of account. There is no evidence that the commission made any investigation, held any hearing, or reached a conclusion that there was "no good cause excusing the delinquency." So far as the evidence goes the imposition of the penalties may have been made by the book-keeper. We conclude that the appellant failed to prove its case.

The judgment is affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concur.



59 Cal.App.2d 213

**JOHNSON et al. v. BARREIRO et al.**

Civ. 6853.

District Court of Appeal, Third District,  
California.

June 15, 1943.

Rehearing Denied July 15, 1943.

Hearing Denied Aug. 12, 1943.

#### 1. Automobiles ⇨192(8)

In action for injuries sustained through buyer's negligent operation of automobile, wherein plaintiffs sought to impose liability on automobile dealer as the owner thereof, contract for sale of automobile

which provided that title should not pass from dealer to buyer until all payments provided for were fully paid authorized finding that when contract was executed dealer retained title to automobile. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

#### 2. Automobiles ⇨192(8)

Under Vehicle Code, conditional seller of automobile is liable within specified amount for negligent operation of automobile with seller's consent by conditional buyer, where seller delivers possession of automobile to buyer and fails to comply with provisions regarding the giving of notice of transfer prior to occurrence of accident. Vehicle Code, § 177, St. 1935, p. 115; § 402, St.1937, p. 2353.

#### 3. Automobiles ⇨192(8)

Where dealer sold automobile and delivered it to conditional buyer and subsequently assigned conditional sales contract to finance company, dealer and not finance company was "owner" of automobile and was liable for accident which occurred through negligent operation of the automobile by buyer eight days after receiving delivery thereof, and prior to giving of notice of the transaction to the State Motor Vehicle Department. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

#### 4. Automobiles ⇨192(8)

Even if assignment of conditional sales contract by automobile dealer to finance company constituted sale of automobile to company, dealer which had failed to give immediate notice of conditional sale to State Motor Vehicle Department which would be necessary to relieve it from liability for negligent operation of the automobile by conditional buyer would not be relieved of liability at least until notice of sale to finance company was received by vehicle department. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

#### 5. Automobiles ⇨192(8)

Where conditional seller of automobile delivered possession thereof to buyer on December 24, even if notice of the transaction was mailed to Motor Vehicle Department on December 31, "notice" as of that date would not be imputed to the department which received the notice on

January 2, so as to relieve dealer from liability as owner of automobile for accident occurring through buyer's negligence on January 1. Vehicle Code, §§ 177, 178, St. 1935, p. 115; § 402, St. 1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

#### 6. Notice ⇐10

Generally, substituted and constructive notices are not favored and are countenanced only as a matter of necessity or extreme expediency.

#### 7. Notice ⇐10

In absence of statute authorizing service of notice by mail, a notice so served is ineffective until it is received.

#### 8. Notice ⇐14

Proof of service of notice by mail should show compliance with conditions of its existence and show that the notice properly addressed, with postage prepaid, was duly deposited in the mail.

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Appeal from Superior Court, Placer County; Dal M. Lemmon, Judge.

Action by Luther Johnson and another against John S. Barreiro and others for injuries sustained in an automobile accident. From an adverse judgment, defendant Ernest Ingold, Incorporated, appeals.

Affirmed.

Van Dyke & Harris, of Sacramento, for appellant.

F. H. Bowers, of Roseville, for respondent.

ADAMS, Presiding Justice.

This is an appeal by defendant Ernest Ingold, Incorporated, a corporation, from a judgment in favor of plaintiffs in an action for damages for personal injuries arising out of an automobile accident. The only question raised upon appeal is the ownership, at the time of the accident, of the automobile which caused the accident, and the ensuing responsibility for injury and damage resulting from its use.

The facts are that John S. Barreiro, who was originally the owner of a Chevrolet coupe, sold same to defendant Ernest Ingold, Incorporated, a Chevrolet dealer, about December 6, 1940, and delivered the certificate of ownership and registration

card, duly endorsed, to said defendant. On December 24, 1940, said defendant sold and delivered the said coupe to defendant Wyatt on a conditional sale contract. On December 27, 1940, Wyatt signed a second conditional sale contract which named defendant Ernest Ingold, Incorporated, as seller, and Wyatt as purchaser, and contained the usual clause retaining title in the seller until payment of the full purchase price. No change in possession, and, apparently, no change in the terms of the contract were then made and the seller still retained the certificate of ownership. At some time between December 27 and December 31, 1940, appellant signed the second contract to defendant Pacific Finance Corporation of California but made no delivery of the car nor certificates of ownership to it. On January 1, 1941, while Wyatt was driving the said coupe near Sacramento, the accident occurred out of which the damages awarded to plaintiffs arose. His negligence is admitted.

No notice of sale or registration of transfer was filed with or received by the Department of Motor Vehicles prior to the accident. Its records showed, however, its receipt, at its San Francisco branch office, of "Dealer's Report of Sale and Transfer" of the said coupe, the registration card and the certificate of ownership, on January 2, 1941. There was no evidence as to how same were delivered to said office. The only witness called by appellant was Ernest Ingold, president of the corporation, who was unable to state how or when they were delivered. Ingold never saw Wyatt and had nothing to do with the transaction which was handled for appellant by other employees, none of whom was called as a witness.

After trial by the court without a jury, findings were made to the effect that appellant Ernest Ingold, Incorporated, was the actual owner of the car at the time of the accident and that Wyatt was driving it with the permission and consent of said owner. Judgment was rendered against Wyatt and said corporation, and the latter only has appealed, contending that appellant made an absolute sale of the automobile to defendant Wyatt, accompanied by delivery of the ownership certificate, and was, therefore, not the owner of the car at the time of the accident; that if, by execution of the conditional sale contracts, appellant became a conditional vendor, nevertheless its status as such ended prior



to the accident; that treating appellant as a conditional vendor who was required by law, in order to be absolved of owner liability, immediately to notify the Department of Motor Vehicles of the transfer, the evidence is insufficient to support a finding that the requirements of the law were not complied with by it; and, finally, that the finding of the court that at the time of the accident Wyatt was driving the automobile with the consent of appellant is without support in the evidence.

[1] While appellant argues that it made an absolute sale to Wyatt prior to the accident, the trial court found that when the conditional sale contract of December 27th was executed, appellant retained title to the car, and this finding finds full support in the contract itself which provided that title should not pass from seller (Ernest Ingold, Incorporated) to buyer (Charles E. Wyatt) until all payments provided for in the contract were fully paid.

As to the second contention, that appellant's status as conditional vendor ended prior to the accident, the court found that on December 27th the second conditional sale contract was assigned to Pacific Finance Company, and that the latter was the assignee on January 1st when the accident occurred, but that said assignee had not then, nor prior thereto, possessed or exercised any dominion over the car, and that the certificates of ownership and the dealer's report of sale were transmitted by appellant to the Motor Vehicle Department and received by its San Francisco branch on January 2nd.

[2] In *Ferroni v. Pacific Finance Corporation*, Cal.Sup., 135 P.2d 569, it was said that sections 402 and 177 of the Vehicle Code, St.1937, p. 2353, and St.1935, p. 115, have been construed as providing that the conditional vendor of an automobile is liable within the amounts stated in the former section for the operation of such automobile with his consent by his conditional vendee in a negligent manner, where he delivers possession of the car to the vendee and fails to comply with section 177 with reference to giving notice of the transfer prior to the occurrence of the accident (citing *Guillot v. Hagman*, 30 Cal.App.2d 582, 86 P.2d 865; *Bunch v. Kin*, 2 Cal.App.2d 81, 37 P.2d 744; *Helmut v. Frame*, 46 Cal.App.2d 372, 115 P.2d 846).

Here, as in the *Ferroni* case, the car was sold on conditional sale contract, and the

vendee was in possession of the car and using it with the consent of the owner at the time of the accident; also in this case, as in that one, there was no immediate notification to the Motor Vehicle Department, as the car was delivered to Wyatt on December 24th and notice was not received by that department until January 2nd. The question is who was the owner on January 1st when the accident occurred. That appellant was the original conditional vendor is apparent from the contract of sale itself, and it continued to be such unless, by its assignment of the conditional sale contract to Pacific Finance Company, it ceased to be such owner prior to the day of the accident. In the *Ferroni* case the court said at page 572 of 135 P.2d: "An assignee of a conditional vendor of a conditional sale contract of a vehicle, is not answerable under section 402 of the Vehicle Code for the negligent operation of the vehicle by the conditional vendee. That follows from the basis of the liability of the conditional vendor under that section. He is liable, and does not fall within the exclusion provision thereof when he fails to comply with section 177 of the Vehicle Code requiring notice of transfer of the car. That section states that when the owner of a vehicle sells title or interest in the vehicle *and delivers possession thereof*, the department must be notified immediately. Ordinarily the conditional vendor delivers possession of the car to the vendee, but the assignee does not. When the assignment is made, delivery of possession to the conditional vendee has already been completed." (Italics by the court.)

[3] Here possession of the car was given to Wyatt by appellant; there was no sale of the car or delivery of possession thereof to the Finance Company, and Wyatt had no dealings with that company, the whole transaction having been handled by appellant's employees; there was no delivery of the certificates of registration and ownership to the Finance Company as far as the evidence shows, and same were apparently retained by appellant and by it delivered to the Motor Vehicle Department when it made its report of sale to that Department. Said report of sale recited: "Complying with the provisions of the Vehicle Code, notification is hereby given to Division of Registration, Department of Motor Vehicles, State of California, that undersigned dealer has transferred vehicle described below" to Charles E. Wyatt. Ap-

pellant's name was appended as dealer. No report of any transfer to Pacific Finance Company was made and it is obvious that no sale or delivery of the automobile itself to Pacific Finance Company was effected. The only report of any sale of the car in question was, then, a report of sale by appellant to Wyatt on December 24th. At that time appellant delivered possession of said car to Wyatt, and never repossessed it.

[4] Assuming, however, that said notice of sale constituted notice of a sale to Pacific Finance, and also assuming that on December 31st appellant made a sale of said car to said company, we are of the opinion that appellant was not relieved of liability at least until notice was received by the Vehicle Department. Appellant argues that it made its report as soon as was reasonably possible, since January 1st was a holiday. But this would not necessarily relieve it of liability in the interim. Recognizing this fact, appellant also argues that the evidence shows that the notice was mailed to the department on December 31st, and that such mailing constituted notice on that date within the provisions of sections 177 and 178 of the Vehicle Code, St.1935, p. 115. Our answer to this is that there was no evidence that the notice was mailed on the 31st, and that the trial court found that the papers were transmitted to the department on January 2nd, the date of their receipt. While Ernest Ingold, president of defendant corporation, testified "I would say that it was mailed by us on the 31st when we received our money," he admitted that he did not know how or when it was delivered; and no other witness was produced in an effort to prove mailing or delivery prior to January 2nd. It was not shown that it was the custom of defendant corporation to mail such reports, and it was admitted that it had "runners" who sometimes performed such services.

Also evidence was produced by plaintiffs showing that appellant was customarily dilatory in the filing of reports of its sales. Other sales made by it on December 31, 1940, were shown not to have been reported until January 4th, 7th and 13th, which perhaps lends significance to the fact that on the morning of January 2nd plaintiff H. A. Crockard, a Chevrolet dealer at Roseville, some of whose equipment was damaged in the automobile accident on January 1st, telephoned to Ernest Ingold, Incorporated,

at San Francisco and had a conversation with someone purporting to be the manager, informed him of the accident, asked if he had sold a car to Wyatt, and advised him also that investigation of the records of the Department of Motor Vehicles indicated the car was still registered in the name of Barreiro, and that it would be well for him to investigate as he understood that Ernest Ingold, Incorporated, had some liability; and that said general manager informed him that they had sold the car "about a week ago," and "we are out of it."

[5-8] Upon the evidence before it we think that the trial court was justified in concluding that the notice was not transmitted until January 2nd, and that its finding to that effect is sufficiently sustained. Even if mailed on the 31st of December, said papers were not received by the department until the 2nd of January; and there is nothing in the applicable statutes to the effect that the deposit of said papers in the mail on the 31st would impute notice to the department as of that date so as to relieve appellant of liability as owner. Generally speaking, substituted and constructive notices are not favored in law and are countenanced only as a matter of necessity or extreme expediency. 20 Cal.Jur. 243. And in the absence of a statute authorizing the service of a notice by mail, a notice so served is ineffective unless and until it is received. 39 Am.Jur. 249; 20 R.C.L. 344. Also proof of service of notice by mail should show compliance with the conditions of its existence, and show that the notice properly addressed, with postage prepaid, was duly deposited in the mail. 39 Am.Jur. 252. There was no such proof in this case.

We further note that while in this court appellant urges that the evidence shows that prior to the accident it had relieved itself of liability by transferring ownership to the Finance Company, the record shows that during the trial Mr. Harris, appellant's counsel, stated regarding that company as a defendant in the action: "But, for the life of me, I am at a loss to see how Mr. Chamberlain's client could possibly be held as owner. I will stipulate right now the action, as far as I am concerned, can be dismissed as to Pacific Finance Company. At best, they could have been a security owner for purpose of security. There couldn't be any liability under any set of

facts." Also: "What do you want to hold them in for? You have no case against them? It is either me, or nobody."

We conclude that the evidence is sufficient to show that ownership liability at the time of the accident rested with appellant, and that the Finance Company was not the title owner as contemplated by the provisions of the Vehicle Code.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



59 Cal.App.2d 68

**DRABKIN et al. v. BIGELOW et al.**

Civ. 6797.

District Court of Appeal, Third District,  
California.

June 3, 1943.

#### 1. Sales ⇨181(11)

In suit to recover price of carpets, where carpets furnished were too small for one room, negotiations followed as to what should be done, but no further work was done by sellers and buyers subsequently obtained carpets from another firm, evidence supported findings and judgment to effect that sellers failed to fulfill their contract. Civ.Code, §§ 1511, 1735, subd. 1.

#### 2. Sales ⇨273(3)

Where sellers knew that carpets were to be used in mortuary and had taken measurements, there was an implied warranty that the goods should be reasonably fit for intended purpose. Civ.Code, § 1735, subd. 1.

#### 3. Sales ⇨173

Where carpet furnished by sellers for chapel of mortuary was too small and buyers objected to patching and insisted upon a first-class job, sellers were not excused from performing contract on ground that they had been prevented from performing. Civ.Code, § 1511.

#### 4. Appeal and error ⇨1010(1)

The reviewing court should support findings and judgment of trial court if

there is any substantial evidence or reasonable inferences to be drawn therefrom in support thereof.

#### 5. Sales ⇨127

Where sellers were to complete carpeting of mortuary on September 4th, but did not deliver carpets until September 5th when it was discovered that carpet for chapel was too small, and sellers were aware by September 8th that buyers expected them to supply carpet of proper size, notice to sellers on September 18th that contract would be considered rescinded unless fulfilled within two days did not unreasonably limit time to fulfill contract.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Suit by Issic Drabkin and another against Frank Bigelow and another to recover the agreed price of carpets and furnishings supplied for use in a mortuary, wherein the defendants filed a counterclaim. Judgment for the defendants, and the plaintiffs appeal.

Judgment affirmed.

Jack J. Miller, of Stockton, for appellants.

Rowan Hardin, of Sonora, for respondents.

THOMPSON, Justice.

The plaintiffs brought suit to recover the agreed price of carpets and furnishings supplied for use in a mortuary at Angels Camp. The complaint contains two counts. The first cause of action is founded on an alleged book account. The second is for the value of the goods. The carpets were defective in that they were not large enough to cover the floors. The defendants refused to permit plaintiffs to piece the carpets, and insisted that several entire new strips of carpet should be supplied. This was not done and the defendants refused to accept the carpets and ordered other carpets and furnishings from another firm.

The defendants denied the material allegations of the complaint and filed a counterclaim for damages for delay in fulfilling the contract. Findings were adopted favorable to the defendants in every respect. Judgment was rendered for the defendants for damages in the sum of \$123.50, and costs, and it was adjudged that the plaintiffs take nothing by their action. From that judgment this appeal was perfected.



It is contended the findings and judgment are not supported by the evidence, chiefly because insufficient time was allowed the plaintiffs in which to repair the admitted defects in the size of the carpets.

The plaintiffs are copartners who are engaged in a furniture and carpet business at Sonora. The defendants are husband and wife. They constructed a building at Angels Camp for the purpose of conducting a mortuary business. About August 1, 1940, they negotiated with plaintiffs to supply the carpets, window blinds and draperies for their building. Measurements of the floors to be carpeted were then made by the plaintiffs. In company with one of the plaintiffs the defendants visited a wholesale carpet store in San Francisco where they selected the material and pattern for their carpets. It was then orally agreed between the parties that the carpets selected, which were to consist of machine-sewed strips, would be furnished, together with specified Venetian blinds and draperies for the sum of \$545.71, on or before September 3d or 4th of that year. The carpets were not delivered at the defendants' building until September 5th. When they were spread on the floors it was discovered the chapel carpet was too small to cover the space. The workmen proposed to enlarge the carpet by sewing on pieces, to which the defendants objected. The defendants declared they would not permit plaintiffs to remedy the defect by piecing the carpet. On September 7th they demanded the substitution of three new strips of carpet. The respondents contend this was not agreed to. No further work was performed. Written notice was served on the plaintiffs on September 18th, terminating the contract unless they fulfilled their agreement by substituting three new machine-sewed strips of carpet, and supplying the blinds and draperies within two days, all in a workmanlike manner according to the contract. That demand was not fulfilled. No further work was performed. The defendants claim the plaintiffs never agreed to substitute new strips of carpet for the defective ones. After the time specified in the notice had expired, the defendants removed the plaintiffs' carpets and materials from their building and stored them, subject to plaintiffs' right of possession. Defendants then purchased carpets and furnishings for their building from John Breuner Company at Stockton, which were supplied and installed within a period

of about ten days. This suit was then commenced.

[1,2] We are of the opinion there is sufficient evidence to support the findings and judgment to the effect that plaintiffs failed to fulfill their contract to supply the selected carpet suitable in size to cover the floors of defendants' building. Having informed the plaintiffs of the particular purpose for which the carpets were intended to be used, and the plaintiffs having taken the measurements for the carpets, there is an implied warranty "that the goods shall be reasonably fit for such purpose." Sec. 1735, subd. 1, Civ.Code.

[3] The defect with respect to the size of the carpet for the chapel floor is conceded by the appellants. There is no conflict of evidence in that regard. But it is contended that plaintiffs agreed to correct that defect "to the satisfaction of the defendants," who, without reasonable excuse, prevented plaintiffs from performing their contract by unduly limiting the time within which it was possible to do so. It is asserted the failure on the part of the plaintiffs to perform their contract within the time prescribed was excused under the provisions of section 1511 of the Civil Code, and that defendants are therefore liable for the contract price of the carpets and supplies. That section reads in part:

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse."

There is no real dispute regarding the cited principles of law. There is, however, an absolute difference of opinion as to whether those principles of law apply to the facts of this case. Regarding the facts as disclosed by the record there is a sharp conflict as to whether the plaintiffs ever agreed to remedy their acknowledged defect in the size of the chapel carpet, by substituting new machine-sewed strips for the ones which were too short, or whether plaintiffs did not insist that defendants accept the carpet with the short lengths merely pieced by sewing on additional material. In other words, did the plaintiffs offer to

remedy the defect so as to render the carpet reasonably fit for the purpose for which it was intended to be used? The evidence is in irreconcilable conflict in that regard.

The appellants concede that the carpet was cut too small for the chapel. In their opening brief they say: "Either on that day or the next, it was learned that the workmen had miscut the carpeting so that it did not fit up against the baseboards and did not fit around staggered places such as bays and alcoves and doorways. It is admitted that this is a fact—at that stage the job was not properly done."

When the defect was discovered on September 5th, after the carpet was spread on the floor, Mrs. Bigelow instructed the workmen to suspend work until it could be decided what could be done to remedy the defect. Issic Drabkin was called and came to the building at once. On observing the condition of the carpet he threw his hands to his head and exclaimed "what a head-ache." He did not state how they could or would correct the error. Mrs. Bigelow again called him on the telephone the night of September 6th. He was very angry and said to her: "You don't know a thing, but think you are sure smart. You haven't any business interfering with them, and you better get yourself an attorney. You will pay for every day the men haven't worked."

He was then told they would have to settle with her husband Frank Bigelow the manner of correcting the mistake in cutting the carpet too small for the room. On September 7th, Mr. Bigelow saw Morris Melser, an employee of the plaintiffs, who told him "everything can be taken care of" and they were willing to do the right thing. Mr. Bigelow replied, "That reads fine, but you are only an employee. If I can hear that from the Drabkin Brothers. You get Ike or Izzy, and bring them out, and have them tell me that, and it will be fine." September 8th, Issic had a conversation with Mr. Bigelow regarding the dispute as to how the error could and would be remedied. Mr. Bigelow testified:

"I asked what he was going to do about it. He would not commit himself. All he would say, was what I wanted him to do. \* \* \* All I wanted him to know, I didn't want a patched up job. It would be necessary for him to take up all the carpet. Before that was done, I would like to see some kind of system there. \* \* \*

"Q. What did you mean? A. I was leaving that up to him, but he didn't commit himself.

"Q. Didn't he offer to replace or fix up three strips to meet your specifications? A. He didn't commit himself. He said three strips need to be put in. I told him to fix it the way he wanted to, but I wanted a first class job. \* \* \* He would not commit himself, but he said three strips will fix the job.

"Q. Did you tell him, do you expect me to pay for that? [the three extra strips] A. There was also damage done to the building. Scarred base board, plaster chipped, one window sill ruined, where they dragged the carpet through, and it had to be re-painted. \* \* \* I asked what kind of a settlement he would make.

"Q. You had reference to whether or not he would come down in his price after he made such a statement, and the way he laid the carpet? A. That is what I wanted. \* \* \* If he had done the job in first class manner and workmanship job, it would have been satisfactory. \* \* \*

"Q. You were not embittered at all toward Mr. Drabkin? A. I wanted him to make a statement, what he was going to do.

"Q. Didn't Mr. Drabkin \* \* \* tell you \* \* \* he wanted to fix the job to your satisfaction? A. Yes, sir, he told me that, but he didn't tell me what he would do about it. \* \* \*

"Q. Did he at any time commit himself as to what he would do? A. No sir, he did not. He said three new strips of carpet *could* be put in. And he could get a portable machine to sew it. I told him if he wanted to finish the job, I would not stop him. I knew I could be held responsible if I kept him from completing the job. I told him I wanted him to complete the work. Was trying to make some kind of arrangement before hand."

The appellants' briefs do not raise the question of insufficiency of the evidence to support the finding that defendants suffered \$123.50 damages on account of the delay in obtaining the use of the building, costs of storage and injury to the walls. We shall therefore assume that award is supported by the evidence.

It is true that the plaintiffs testified they told the defendants they were willing to supply the three strips of carpet demanded by the defendants and to complete the contract

to their entire satisfaction. We are therefore not attempting to quote plaintiffs' evidence in conflict with that of the defendants on that subject. The preceding evidence is certainly reasonably susceptible of the construction placed upon it by the trial judge, to the effect that the defendants did not prohibit or prevent plaintiffs from completing the job. They did insist on a good workmanlike job, and said they did not want a "patched up job." They also wanted to know what allowance would be made for the damage plaintiffs had done to the wall, baseboard and window. They also wanted to know whether plaintiffs would charge them an additional price for the three new strips of carpet if they were substituted. According to the defendants, the plaintiffs admitted they *could* replace the three strips, but they did not agree to do so. Even if the inference is that they did agree to supply the three new strips, they did not tell defendants whether they would be charged an additional sum for so doing. Basing our conclusion on the evidence of the defendants, it is reasonable to assume that if the plaintiffs had agreed to replace the three strips of carpet without further expense to the defendants, nothing would have prevented them from completing their job within a few days after September 7th, when that demand was definitely made.

[4] On appeal it is our duty to support the findings and judgment of the trial court if there is any substantial evidence, or reasonable inferences to be drawn, therefrom, in support thereof. This well-known rule is concisely stated in *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183, 184 as follows: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

[5] The remaining question is whether the plaintiffs were given a reasonable time within which to rectify their mistake before the contract of purchase was terminated. Defendants served a written notice on plaintiffs on September 18th that unless the contract was fulfilled within two days of that

time it would be considered rescinded. It is argued that the two days granted from that time rendered it impossible to order the carpeting from San Francisco and to complete the job within that time. This may be conceded. But the evidence is undisputed that plaintiffs had notice of the defective work on September 5th. They knew not later than September 8th that the defendants expected them to supply three new strips of carpet to replace the short ones. They had originally agreed to complete the work on September 4th. They knew the defendants were anxious to occupy their building as a mortuary at the earliest possible date. It was their duty to promptly take steps to remedy their mistake as soon as they could reasonably do so. They should have ordered the extra strips of carpeting not later than September 8th. The written notice was merely additional time allowed after their former demands. The plaintiffs really had twelve days' notice to complete the job after receiving information that defendants expected them to supply three new strips of carpeting, during which time they made no effort to procure the material or to complete the work. The blinds and draperies were never delivered.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concurred.



59 Cal.App.2d 289

PORTER et al. v. SIGNAL TRUCKING  
SERVICE, Limited, et al.

Civ. 2880.

District Court of Appeal, Fourth District,  
California.

June 22, 1943.

# I. Appeal and error §930(1), 989

An appellate court, when reviewing evidence in support of verdict and judgment on disputed issues of fact, must consider all the evidence and must accept as true evidence tending to establish correctness of finding or verdict and consider evidence in most favorable aspect toward prevailing party and give him benefit of



every favorable inference that can reasonably be drawn in support of his claim.

## 2. Automobiles Ⓒ244(37)

Evidence that truck and trailer were driven approximately 45 miles per hour in fog and dark on slippery highway and on driver's application of brakes skidded and overturned blocking highway, and that no flares were put out, sustained finding that driver's original negligence was "proximate cause" of plaintiff's injuries resulting when plaintiff drove into trailer.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

## 3. Automobiles Ⓒ245(46)

Where truck and trailer were driven approximately 45 miles per hour in fog and dark on slippery highway and on application of brakes skidded and overturned, whether truck driver violated basic speed laws so as to be chargeable with negligence in action by motorist who collided with overturned trailer was for jury. Vehicle Code, § 510, St.1935, p. 176; § 511, St.1939, p. 2108.

## 4. Automobiles Ⓒ168(2)

Vehicle Code requirement that motorists drive in careful manner and with due regard for safety of others is recognition of rule that "prima facie speed limits" fix a prima facie maximum, but not a minimum, for careful driving. Vehicle Code, § 510, St.1935, p. 176; § 511, St.1939, p. 2108.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Speed Limit".

## 5. Trial Ⓒ253(4)

Defendants' requested instruction that, under rule that one has right to assume that other persons using highway will obey law, truck driver had right to assume that plaintiff motorist would stop, was too favorable to defendants in that it omitted requirement that before driver could rely on such assumption he must himself be without fault.

## 6. Automobiles Ⓒ245(83)

In action for injuries sustained when plaintiff's automobile collided with defendant's overturned trailer in fog, plaintiff's contributory negligence was for jury.

Appeal from Superior Court, San Diego County; Hon. Edward J. Kelly, Judge.

Action by Rufus Porter and James A. Ortega against Signal Trucking Service, Limited, and Leslie W. Vance to recover for injuries sustained in collision between automobile operated by plaintiff Porter and defendants' truck. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Davies & Wallace, of San Diego, for appellants.

Rorick & Cottingham, of Oceanside, and Monroe & McInnis, of San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents brought this action for damages on account of injuries received in a collision on Pacific Highway, in the city limits of San Diego, on February 17, 1941. Plaintiff Ortega was riding as a guest in an automobile operated by plaintiff Porter in a southerly direction on Pacific Highway. Pacific Highway is a four-lane "through" highway (each lane is 22 feet wide) divided in the center by a concrete island or partition, and is the main highway leading from the City of San Diego to Los Angeles. Defendant Vance, driver for the defendant Signal Trucking Service, Ltd., was operating a loaded truck and trailer consisting of three units, in a southerly direction on that highway. These units were controlled by air brakes. The accident occurred at an intersection where Magnolia Avenue enters Pacific Highway from the west, but does not cross Pacific Highway. There is a break, however, in the concrete divider, just as if Magnolia Avenue continued through as a street at that point. There was a stop sign at the entrance of Magnolia Avenue into Pacific Highway. About 6 A. M., the time of the accident, the highway was wet and there was a heavy fog. It was still dark. As Vance came to the intersection of Magnolia Avenue and Pacific Boulevard, he was traveling between 40 and 45 miles per hour. The truck and trailer were upset in such fashion that the trailer lay on its side across the westerly or south-bound half of the highway, blocking practically the entire pavement. The highway was of dark concrete and as the trailer lay on its side the bottom of it was in the direction facing oncoming traffic from the north. It was also of a dark

color that blended with the color of the pavement and at the time of the morning between dark and daylight it was very difficult to see. Shortly after the trailer was upset on the highway the car driven by Porter collided with the trailer. According to plaintiffs' testimony there were no lights or other flare warnings on the truck or in the highway at the time. Porter and Ortega received serious injuries.

Vance testified in his deposition, offered in evidence by plaintiffs, that he was driving his truck south on Pacific Highway in the right-hand lane that morning; that as he was about 100 feet from the intersection he saw a car (Wilcox car) approaching from the west at about 5 miles per hour and at a position about 40 or 50 feet from Pacific Highway on Magnolia Avenue; that his lights and the lights on the Wilcox car were burning; that he noticed that the Wilcox car came onto Pacific Highway without stopping at the boulevard stop sign and crossed "the center line about six feet" and then stopped; that Vance applied his brakes and immediately "swerved" his truck suddenly to his left to avoid striking the Wilcox car; that he then ran into the center island and that the trailer portion turned over, as indicated; that after the Wilcox car came to a stop in the highway it backed up, otherwise he would have hit it. He also testified that the cab portion of the truck did not turn over and that he was not hurt; that he jumped out of his truck to "grab his flares" but did not have time to place them; that he saw two machines, about 150 yards or so north of him, coming south so he waved his arms at them; that in about 8 to 10 seconds one car stopped and the second one (Wilcox's car) "pulled to the inside and ran right into the center of the semi". He also testified that he later put out flares in the highway and that he noticed that the skid marks made by the truck were about 200 feet long.

The testimony of an occupant of the Wilcox car, produced by defendants, gives a different version of the accident as to where that car stopped at the intersection. He testified that the Wilcox car approached the intersection at about five miles per hour; that he saw the defendants' truck approaching three or four hundred feet north of the intersection; that the front wheels of the Wilcox car "went up about three or four feet on the shoulder", three or four feet west of the pavement and stopped; that it did not stop on the pave-

ment and did not back up at any time; that the truck seemed to swerve a little bit to the left about 100 feet north of the intersection; that it was traveling between 40 and 45 miles per hour; that it hit the center island and upset the back trailer; that within a "few seconds" two cars came from the north traveling about 50 or 60 miles per hour; that Vance was waving his hands at the oncoming cars; that he later heard a crash.

Plaintiff Porter testified that as he was coming from the north he stopped a few miles north of the scene of the accident and that a truck and trailer, which he did not identify as that belonging to defendants, overtook him going south about 60 or 65 miles per hour; that that was the only one to pass him that morning; that as he later approached the intersection here involved he was using his windshield wiper on account of the fog and that he had been averaging about 30 or 35 miles per hour; that he was driving on the right-hand lane going south and that as he crossed the intersection he was traveling about 25 miles per hour and then picked up speed to about 30 or 35 miles; that suddenly he saw a dark object 20 or 25 feet in front of him; that it showed up quickly; that he tried to put on his brakes but did not have time; that he saw no lights of any kind ahead of him on the truck or otherwise; that no other vehicles were ahead of him or around as he crashed into the trailer on the truck; that he was knocked unconscious and removed to a hospital where he remained for about one week.

Plaintiff Ortega corroborated the testimony of plaintiff Porter. Other witnesses also testified to the effect that they saw no signal man, lights or flares on or about the truck immediately after the accident; that the surface of the highway was wet and that it was foggy.

A police officer, called to the scene of the accident, testified that he ordinarily rode a motorcycle on such calls but due to the fact that the pavement was wet or slippery he rode in an automobile on that occasion; that the scene of the accident was about 40 to 50 feet south of the intersection; that there were apparently 250 feet of skid marks from the 16 wheels of the truck measured from the first part of the skidding to the last.

Defendants now contend (1) that this is not sufficient evidence to show that the defendant truck driver was negligent before

his truck was overturned on the highway, and not sufficient evidence to show any act of negligence after such happening; (2) that if there was prior negligence on the part of the driver, it was not the proximate cause of the injury to the plaintiffs; and (3) that plaintiff Porter was guilty of contributory negligence as a matter of law.

These issues were submitted to the jury. Verdicts were rendered in favor of plaintiffs. The amounts of the verdicts as they finally stand, is not questioned in relation to the sufficiency of the evidence to support them.

If the evidence is sufficient to establish the negligence of the defendant truck driver prior to and at the time the trailer upset on the highway and that such negligence was a proximate or efficient cause of the injuries to plaintiffs and that cause either directly produced or set in motion a chain of events which, if uninterrupted by any independent, intervening, efficient cause, produced the injuries complained of and without which such injuries or damage would not have occurred, then it will not be necessary to determine the other question presented, whether defendant truck driver was negligent in failing to put out flares or give a proper warning of the dangerous position of the truck, as contended.

The court fully instructed the jury that " \* \* \* the burden rests upon plaintiffs to establish by a preponderance of the evidence that the proximate cause of the accident was the negligence of defendant Vance. By proximate cause is meant the efficient cause, or that cause which either directly produces or sets in motion a chain of events which, uninterrupted by any independent, intervening, efficient cause, produces the injury complained of and without which such injury or damage would not have occurred."

[1-4] In analyzing the testimony produced, we find ourselves immediately confronted with the rule of which appellants' counsel are fully aware, that because of the presumptions in favor of the verdicts and judgment the appellate court, when reviewing the evidence in support of such verdicts and judgment must take into consideration all of the evidence rather than certain disconnected portions thereof. It must accept as true all evidence tending to establish the correctness of the finding or verdict, and it must consider it in the most favorable aspect toward the prevailing party and give to him the benefit of every fa-

vorable inference that can reasonably be drawn in support of his claim. 2 Cal.Jur. p. 879, sec. 515. In view of the rule, we must accept as true the evidence and inferences supporting the theory that the Wilcox car did stop three or four feet west of the concrete pavement; that the defendant driver was traveling at least 40 or 45 miles per hour; that the highway was slippery and the weather foggy, and notwithstanding these facts, he negligently and erroneously misjudged the true conditions then and there existing, suddenly applied his brakes and "skidded" for a distance of approximately 200 feet and failed to keep his truck under proper control at the time; and that such negligence was the proximate or original cause of the accident, unbroken in sequence, without any intervening, efficient, independent cause, which produced the injuries complained of and without which such injuries would not have occurred. The trial court properly gave an instruction under the basic speed laws of this state (secs. 510 and 511 of the Vehicle Code, St.1935, p. 176, St.1939, p. 2108) to the effect that no person shall drive a vehicle upon the highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and the width of the highway, and in no event at a speed which endangers the safety of persons or property. Whether the truck driver was violating those provisions of the Vehicle Code under the conditions here related was a question of fact. The legal requirement that drivers of vehicles shall drive in a careful manner and with due regard for the safety of others is a recognition of the rule that prima facie speed limits fix a prima facie maximum, but not a minimum, for careful driving. *Cook v. Miller*, 175 Cal. 497, 166 P. 316; *Weaver v. Carter*, 28 Cal.App. 241, 152 P. 323; *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A.L.R. 401.

[5] The trial court gave an instruction on the imminent peril rule and in addition thereto, at the request of defendants, gave the following instruction, which was broader and much more favorable to the defendants than they were entitled to receive: "You are instructed that a party has a right to assume that other persons using the highway will obey the law and that the driver of the truck and trailer in this case had the right to assume that Wilcox would stop his Buick automobile. \* \* \*" The instruction thus requested and given,



omitted by reference the requirement that before the defendant driver could rely upon such assumption, he must himself be without fault. *Carroll v. Central Counties Gas Co.*, 74 Cal.App. 303, 240 P. 53; *Angelo v. Esau*, 34 Cal.App.2d 130, 93 P.2d 205. Notwithstanding these instructions, the jury found against defendants and the issues there presented.

[6] Appellants' next contention that plaintiffs were guilty of contributory negligence as a matter of law is not meritorious. The evidence was conflicting as to the speed of the plaintiffs' car at the time. Whether proper precautions were taken by the driver of that car under the circumstances enumerated was a question of fact for the jury. That question was decided in plaintiffs' favor. Under the evidence, we cannot disturb that finding. *Black v. Southern Pac. Co.*, 124 Cal.App. 321, 12 P.2d 981.

We have carefully examined all of the instructions given and considered them in connection with the others about which appellants complain. We conclude that the jury was fully and fairly instructed as to the law and that the evidence supports the verdicts and judgment based thereon.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.



BAUGH v. ROGERS et al.\*  
Civ. 14032.

District Court of Appeal, Second District,  
Division 2, California.

June 16, 1943.

Rehearings Denied June 30, 1943.

Hearing Granted Aug. 12, 1943.

# 1. New trial Ⓒ157

On plaintiff's motion for new trial on ground of insufficiency of the evidence, plaintiff's testimony must be taken as true.

## 2. Workmen's compensation Ⓒ283, 316, 2084

Where plaintiff was engaged at an hourly wage in house cleaning at premises used by physician as his offices and residence, and physician's wife gave directions as to

\* Subsequent opinion 148 P.2d 633.

what work was to be done, plaintiff was not an "independent contractor" but was an "employee" of physician, and, where plaintiff was cleaning the offices when physician backed an automobile into plaintiff, her employment was in the "course of profession or occupation" of her employer, requiring plaintiff to present her claim to the Industrial Accident Commission and not to the superior court. *St.1937, p. 267, § 3353; p. 268, § 3355.*

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Profession or Occupation", "Employee", and "Independent Contractor".

## 3. Workmen's compensation Ⓒ306

Generally, the test by which to determine whether a person is acting as an "independent contractor" or an "employee" involves the question of control. *St.1937, p. 267, § 3353.*

## 4. Workmen's compensation Ⓒ2138

Where evidence was reasonably susceptible of single inference that plaintiff was not an "independent contractor" of physician backing an automobile into her, issue was "question of law" for the court. *St.1937, p. 267, § 3353.*

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

## 5. Workmen's compensation Ⓒ2084

Where the employee's activities involved several types of work, question whether his remedy is to seek compensation benefits as for an injury received in the course of trade, business, profession, or occupation of his employer, or to seek redress in the courts, depends upon the nature of his employment at the moment of injury. *St.1937, p. 268, § 3355.*

## 6. Workmen's compensation Ⓒ2084

Under statute providing that, where the conditions of compensation exist, the right to compensation except as provided in statute relating to employer's failure to secure payment thereof is the employee's exclusive remedy against his employer, where conditions of compensation existed for injuries sustained when employer backed his automobile into employee, and employer had

secured payment of compensation to his employees, the superior court was without jurisdiction to entertain employee's injury action against employer. St.1937, p. 185; p. 269, § 3601; p. 271, § 3706.

#### 7. Automobiles ⚡192(1)

##### Workmen's compensation ⚡2158

Under statute providing that negligence of a person using an automobile with owner's permission shall be imputed to the owner, where employer was operating automobile with the owner's permission when automobile was backed into employee, employer's negligence was imputable to owner, and employee as against the owner could pursue her remedy in the superior court and was not limited to presentation of a claim to the Industrial Accident Commission. Vehicle Code, § 402(a), St.1937, p. 2353.

#### 8. Automobiles ⚡192(1)

The liability of an automobile owner under statute providing that negligence of a person using an automobile with the owner's permission shall be imputed to the owner is primary and direct and not secondary in so far as the injured party is concerned. Vehicle Code, § 402(a), St.1937, p. 2353.

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Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Ora Baugh against Francis L. Rogers and another for injuries sustained in an automobile accident. From an order granting plaintiff's motion for new trial, defendants appeal.

Order affirmed as to defendant Warnock and reversed as to defendant Rogers.

Paul Nourse, of Los Angeles (Everett W. Thompson, of Los Angeles, of counsel), for appellants.

Russell H. Pray and Robert E. Krause, both of Long Beach (Samuel J. Nordorf, of Long Beach, of counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover for injuries which were suffered when she was struck by an automobile owned by defendant Warnock and driven by defendant Rogers. At a trial by the court without a jury a judgment was rendered in favor of defendants. Thereafter plaintiff's motion for a new trial was granted upon the ground, among others, of the insufficiency of the evidence to justify the

decision. From this order defendants have appealed.

The accident occurred on July 22, 1941, in the city of Long Beach. Plaintiff was cleaning the offices of defendant Rogers, a physician and surgeon, when she was struck by an automobile which, according to the allegations of the complaint, was being negligently backed by defendant Rogers along the driveway running by his office. The automobile was owned by defendant Warnock, who had given permission to defendant Rogers to use it. By their answer defendants denied negligence, asserted contributory negligence on the part of plaintiff, and especially pleaded that the superior court was without jurisdiction in the matter for the reason that plaintiff's injuries occurred in the course of her employment in cleaning the offices of Dr. Rogers. The trial court found that plaintiff was injured while acting in the course and scope of her employment and that the injuries arose out of her employment. The court also found that defendant Rogers elected to be bound by the provisions of the Labor Code, St.1937, p. 185, that he had insured against liability for compensation to all persons employed by him and that plaintiff did not at any time give notice that she elected not to be subject to the provisions of the Labor Code. From these findings the court concluded that it did not have jurisdiction but apparently reached a different conclusion when at a later date it granted the motion for a new trial.

Plaintiff asserts that there is a conflict in the evidence and, relying upon the rule that where reasonable minds might differ in their deductions from the evidence the trial court is justified in granting a new trial (Ogando v. Carquinez Grammar School Dist. 24 Cal.App.2d 567, 75 P.2d 641), contends that the trial court did not abuse its discretion in the present case. On the other hand, defendants contend that in any view of the evidence presented the superior court is without jurisdiction in the matter. They rely upon the rule that a new trial may not be granted to the plaintiff if in any event a judgment must be rendered in favor of the defendant. Wall v. Equitable Life Assur. Soc., 33 Cal.App.2d 112, 91 P.2d 145; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 478, 168 P. 1037.

[1] Plaintiff bases her contention that the superior court has jurisdiction in the

matter mainly upon the assertion that she was an independent contractor and therefore was not limited to the presentation of her claim to the Industrial Accident Commission. Dr. Rogers maintained offices at his residence, a two-story house in which surgery and reception rooms were maintained on the first floor. These rooms were used by Dr. Rogers in the practice of his profession. Plaintiff placed an advertisement in a newspaper offering her services in house cleaning. The wife of Dr. Rogers answered this ad and employed plaintiff to do house cleaning in both parts of the house, those occupied as a residence and those maintained for professional services. She received 35¢ per hour plus car fare, a sum which was later increased to 40¢ per hour. Plaintiff generally worked on the Rogers premises one day each week but sometimes more often. There was no agreement that she should work any certain number of hours per day but in fact she generally worked eight or nine or ten hours per day, depending upon the amount of work to be done. Plaintiff used the vacuum cleaner and soap which she found in the house but there is a conflict of testimony concerning the use of other equipment which was available. Plaintiff testified that she used her own mops and other equipment and for the purposes of this motion her testimony must be taken as true. Concerning a conversation with Mrs. Rogers at the time she was employed plaintiff testified: "I had advertised I was an expert house cleaner, window and wall washer; she wanted to know if I was capable of going through the work of the house if she would tell me what to do, and I said, 'Certainly I am; I can clean your home well, that is all I do, is house cleaning and window washing.' She said, 'I am glad to find some one to go through with the work without bothering.' \* \* \* Directing your attention to Mrs. Rogers, when you came out there did you have a conversation with her about the nature of your work, what was to be done? A. She told me exactly what to do and left me, and I went through it. Q. How often did you work for her? A. Whenever she could get me. Lately I have not been working every week for her because she could not get me." Upon her arrival upon the premises to begin work plaintiff was often directed by Mrs. Rogers to begin her work in a specific portion of the house and was instructed by Mrs. Rogers as to what work was to be done first on the

particular day. Sometimes the instructions were changed. Plaintiff had been working on the premises for several months before the date of the accident. During this period she also worked at other residences.

Plaintiff was engaged in cleaning the offices of Dr. Rogers on the day of the accident. She testified: "Well, I was cleaning the Doctor's office. She told me if I ever found the window open, to call her. (If) I could not fasten it, to call her and she would help me fasten it. So I called upstairs to her and she came down. She sent me outside to push and jam the window in, while she was holding and pulling on it on the inside. All of a sudden she threw up her hands and said, 'Ora, watch out.' I just had time to whirl around. I was standing right up against the house. He hit me and pinned me onto the house, hit me on the knee and crushed my leg into the back of the house."

[2] The only reasonable construction to place upon the evidence is that plaintiff was not an independent contractor. In section 3353 of the Labor Code, St.1937, p. 267, an independent contractor is defined as one "who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished". Plaintiff was not employed for a specified recompense for a specified result; rather she was employed to do cleaning work on the premises of Dr. Rogers at a certain price per hour when she worked. Plaintiff was not employed to clean the premises for a definite price. The employer could and did give directions as to what work should be done, whether it should be washing windows or cleaning floors or walls. The employer directed whether she should work upstairs or down or whether she should work in the domestic or business portion of the premises. At the moment of the accident plaintiff was working under the specific directions of Mrs. Rogers.

[3, 4] Many cases have come before the reviewing courts of California in which the question before the court involved a determination whether the injured party was an independent contractor. Some of these cases have been frequently cited and reviewed and there is no occasion to here present another review of the decisions on the subject. Although various elements frequently enter into the solution of the



problem, it is generally recognized that the important test by which to determine whether a person is acting as an independent contractor or as an employee involves an answer to the question whether the person at the time of the injury was subject to the orders and control of the other party. The important element is the right of control, whether the right be exercised or not. *Chapman v. Edwards*, 133 Cal.App. 72, 24 P.2d 211; *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 250 P. 570. Before plaintiff commenced work she was asked if she was capable of doing the work if she was told what to do. Mrs. Rogers did in fact lay out the work for plaintiff and told her what to do. For this she was paid an hourly wage. Plaintiff refers to the fact that Mrs. Rogers sometimes departed from the house, leaving plaintiff to do her work. The fact that Mrs. Rogers did not stand by and direct the work while plaintiff was cleaning the premises does not justify the conclusion that plaintiff was not an employee. It is seldom that employers direct employees in the minute details of their conduct. It is clear that at all times Mrs. Rogers had the right of control over the activities of plaintiff. A holding that one engaged to do house-cleaning for an hourly wage in an establishment such as that of Dr. Rogers is an independent contractor would do violence to the generally accepted concept of the status of those engaged in such services. The evidence being reasonably susceptible of the single inference that plaintiff was not an independent contractor, the question is one of law for the court. *Chapman v. Edwards*, supra, 133 Cal.App. page 79, 24 P.2d 211.

[5] Since plaintiff at the time of the injury was cleaning the offices of Dr. Rogers, the employment was in the course of the profession or occupation of her employer. Section 3355 of the Labor Code St.1937, p. 268, provides: "'Course of trade, business, profession or occupation of his employer' includes all services tending toward the preservation, maintenance, or operation of the business, business premises, or business property of the employer." It could not be reasonably argued that the cleaning of the windows and doors of a factory would not tend toward the maintenance and operation of the business. The same reasons apply to the cleaning of the offices of a physician. Although plaintiff worked partly in cleaning the residence,

she none the less was actually engaged at the moment of the injury in the performance of duties which tended towards the maintenance and operation of the business premises of her employer. Where the activities of an employee involve several types of work the question whether his remedy is to seek the compensation benefits under the provisions of the Labor Code or to seek redress in the courts depends upon the nature of his employment at the moment of the injury. The dual capacity of an employee has been recognized by the courts of California. *Kramer v. I.A.C.*, 31 Cal.App. 673, 161 P. 278; *Lacoe v. I.A.C.*, 211 Cal. 82, 293 P. 669. In the *Kramer* case one Ohlsson was an employee of Kramer, who conducted a dancing academy in a building which was also used by him as a residence. Ohlsson was employed as a janitor to clean the rooms of the dancing academy and was also employed as a gardener to care for the flowers and shrubbery on the adjoining land. It was held that: "Ohlsson was thus employed for the performance of services in two capacities: One that of janitor, falling within the terms of the act; the other as a house and garden laborer; employes engaged therein being excluded from its operation" [31 Cal.App. 673, 161 P. 279]. He was injured while pruning a tree in an adjoining driveway. The court held that Ohlsson's injury "arose out of and was in the course of his employment, not as a janitor, but while engaged in garden labor" and that the award of the I.A.C. should be annulled.

[6] It is provided in section 3601 of the Labor Code, St.1937, p. 269, as follows: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death." Section 3706 of the Labor Code, St.1937, p. 271, has no application to this action for it was established that Dr. Rogers secured the payment of compensation to his employees by procuring the insurance policy referred to in the section. Since the conditions of compensation exist in accordance with the provisions of the Labor Code, the superior court was without jurisdiction to entertain the action against Dr. Rogers.

[7,8] Defendant Warnock is in a different situation. He is the owner of the automobile involved in the accident and Dr. Rogers was operating it with his per-

mission. Under the provisions of section 402(a) of the Vehicle Code, St.1937, p. 2353, the negligence of Dr. Rogers is imputable to defendant Warnock, who is liable to the limited extent fixed in the code section. The liability of the owner of a vehicle under this section "is a primary and direct liability and not a secondary one in so far as the injured party is concerned". *Broome v. Kern Valley Packing Co.*, 6 Cal.App.2d 256, 261, 44 P.2d 430, 432. The owner of the vehicle is directly liable for damages suffered in an amount limited by the statute, a liability which is direct and several, as well as joint, and is not dependent on a judgment against the operator of the car. *Holland v. Kodimer*, 11 Cal.2d 40, 77 P.2d 843; *Phipps v. Superior Court*, 32 Cal.App.2d 371, 89 P.2d 698.

Plaintiff was not an employee of defendant Warnock. As against him plaintiff can pursue her remedy in the superior court.

The order is affirmed as to defendant Warnock. It is reversed as to defendant Rogers.

MOORE, P. J., and McCOMB, J., concur.



59 Cal.App.2d 370

**PEOPLE v. ONE 1941 CADILLAC 4 DOOR  
TOURING SEDAN, BEARING ENGINE  
NO. 8346270, BEARING 1941 LICENSE  
NO. 64F731.**

Civ. 2894.

District Court of Appeal, Fourth District,  
California.

June 25, 1943.

# I. Forfeitures ☞5

In proceeding to forfeit automobile allegedly used to transport narcotics, state had burden of proving that marihuana cigarettes allegedly taken from driver's possession when booked at city jail for driving while intoxicated were in possession of driver while he was driving the automobile in question. St.1939, p. 767 et seq., § 11610 et seq., as amended.

## 2. Evidence ☞60

In proceeding to forfeit automobile allegedly used to transport narcotics, there was a presumption of innocence in favor of owner and driver who, it was contended, had marihuana cigarettes in his possession while driving automobile. St. 1939, p. 767 et seq., § 11610 et seq., as amended.

## 3. Forfeitures ☞5

Whether two marihuana cigarettes found on shelf with articles taken from accused shortly after he had been booked for driving an automobile while intoxicated, and which allegedly were not there before, but which searching officer could not recall having taken from accused were in accused's possession while operating automobile, so as to warrant its forfeiture for use in transporting narcotics was a question of fact for trial court whose finding with respect thereto was binding on appeal. St.1939, p. 767 et seq., § 11610 et seq., as amended.

## 4. Appeal and error ☞996

Where more than one inference can reasonably be deduced from the facts, trial court's finding of facts cannot be disturbed on appeal.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Proceeding by the People of the State of California against One 1941 Cadillac 4 door Touring Sedan, Bearing Engine Number 8346270, Bearing 1941 License No. 64F731, to establish that the automobile had been used to transport narcotics and to declare it forfeited to the state. From a judgment ordering the automobile released to its owner, the People of the State of California appeal.

Judgment affirmed.

Robt. W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

Edward L. Davin, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is a proceeding under the provisions of Div. 10, Ch. 7 of the Health and Safety Code St.1939, p. 767 et seq., as amended, to establish that an automobile had been used to transport narcotics and to declare it forfeited to the state. The owner and driver of the car, one McKinney, was arrested in San Diego about

3 o'clock A.M. on June 8, 1942, on a charge of driving while under the influence of liquor. He was booked at the city jail at 3:20 A.M. when he was searched. Shortly thereafter, two brown cigarettes which contained marihuana were found on a shelf with articles which had been taken from McKinney's pockets. In this proceeding, which followed, the court found in favor of the defendant and entered a judgment ordering the car released to McKinney. The People have appealed from the judgment upon the sole ground that there is no evidence whatsoever to support the findings and judgment, and that all of the evidence is clearly and directly contrary thereto.

It appears that in the booking office of this jail there was a counter on which were a number of things used for clerical purposes. About six inches above the counter was a shelf. There was grill work around the counter and the shelf with a small window therein, through which the shelf could be reached.

Sergeant Lynch testified that he was present when McKinney was brought in; that officers Weathers and Krause were also there; that he did not watch officer Weathers search McKinney; that he paid no attention to this search until his attention was called by officer Krause to two home-made cigarettes "laying on that shelf"; that there had been nothing on this shelf when McKinney was brought in; that Krause remarked that he believed these cigarettes were marihuana and that it would be wise to notify the proper officers; that this conversation was in the presence of McKinney and officers Krause and Weathers; that he did not discuss these cigarettes with McKinney; that the cigarettes were discovered when McKinney's left-hand coat pocket had been emptied; and that officer Weathers then proceeded to search the right-hand pocket. He also testified that on that day he went to work at 3 o'clock in the afternoon and left the jail at 11 o'clock that night, and that McKinney was brought in and searched between those hours.

Officer Weathers testified that he searched McKinney on this occasion. To a question by the court as to whether he took these cigarettes from the man's pocket he replied: "Well, sir, I don't know. I searched the man. There was nothing on the counter at the time, on the ledge I placed his belongings on, and the cigarettes appeared there. However, I did not see

them as I took them out of his pockets. I couldn't swear that I took them directly from his pockets." He further testified that there was no conversation with reference to these cigarettes in the presence of McKinney; that he had previously seen marihuana cigarettes which were similar to these; that he first saw these cigarettes or had his attention called to them after all entries had been made in the booking slip and after he took McKinney away and locked him up; that when he returned after doing this he found the sergeant and officer Krause examining the cigarettes and talking about them; that this was the first he knew of them; and that "I can't say that I actually took them from his person."

Officer Krause testified that he was the booking officer; that McKinney was booked at 3:20 A.M.; that he was writing his property receipt; that there was nothing on the shelf; that Weathers was searching McKinney and placing the property through the window; that while "checking the property" he found the cigarettes, which "were loose"; that he checked the property immediately after it was placed on the shelf; and that he called the cigarettes to the attention of Sergeant Lynch "who was standing at my right working the typewriter." On cross-examination he testified that he made a list of what was taken from McKinney and gave him a copy; that he did not put any cigarettes on the list; that "cigarettes, we never index; just things of value"; and that he did not see these cigarettes taken from McKinney's person.

The evidence justifies the inference that the two cigarettes in question were not discovered by Krause until after the booking of McKinney had been completed and he had been taken away. While Sergeant Lynch testified that they were discovered while the search was in progress, he also testified that he did not watch the search and was paying no attention to it. He was operating a typewriter at the time, and he was even mistaken as to the time of day when the search was made. The trial judge was not compelled to take all of his testimony at face value. While Krause testified that he discovered the cigarettes while he was "checking the property" this must have been after McKinney was taken away as Krause said he immediately called the matter to the attention of Sergeant Lynch, and officer Weathers testified that nothing was said about the cigarettes



until after he had taken McKinney away and that when he returned he found the other two officers talking about them. It is hardly reasonable to suppose that so important an item would have been omitted from the list being made if it had been discovered before the list was completed and a copy given to McKinney. Regardless of the custom with respect to listing ordinary cigarettes, it seems unlikely that officers would intentionally fail to list narcotics found in the possession of a prisoner.

[1] The appellant argues that all of the material facts are established by direct, positive and uncontradicted evidence and that there is no room left for any inference. However, there is nothing to support its present contention except inferences. The burden was upon the appellant to prove that these cigarettes had been in the possession of McKinney and that they had been in his possession while he was driving the car in question. There is no direct evidence of either of these facts. Under appellant's theory there is necessarily involved not only one inference but another based upon the first. It is argued that, since the officers testified that there was nothing on this shelf prior to the search, these cigarettes must have come from McKinney's pockets. One of the officers was obviously mistaken in two important matters, and it is not impossible that they were all mistaken in this one. They were busy with and interested in other things and they might easily have failed to observe two such small articles if they were on the shelf. That they should do this is no more improbable than that the searching officer should fail to see that kind of cigarettes, with which he was familiar, if he actually handled them and removed them from a person's pocket at a time when he presumably would be rather definitely interested in what he was doing.

[2-4] Not only was there a presumption of innocence favoring McKinney, which could be considered by the trial court, but we think the court was not compelled to draw the particular inferences on which the appellant now relies. It cannot be said, as a matter of law, that the court could not reasonably have drawn the inference that these cigarettes could not have been taken from a prisoner and handled by an experienced officer without being seen, and that they had come from

some other source. It was not incumbent upon the defense to establish where the cigarettes came from but the burden rested upon the appellant to satisfactorily prove that they had been in the possession of McKinney. The question was entirely one of fact for the trial court and its finding and conclusion cannot be disturbed when more than one inference from the facts is reasonably possible. *Bellon v. Silver Gate Theatres, Inc.*, 4 Cal.2d 1, 47 P.2d 462.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



59 Cal.App.2d 255

**GAYER v. WHELAN, Dist. Atty.**

**Civ. No. 2867.**

District Court of Appeal, Fourth District,  
California.

June 17, 1943.

Hearing Denied Aug. 12, 1943.

#### 1. Lotteries ☞3

Under statute defining "lottery", two or more persons must have paid or promised to pay consideration for chance of obtaining prize or part thereof or share or interest therein to be distributed by lot or chance between or among them. Pen.Code, § 319.

See Words and Phrases, Permanent Edition, for all other definitions of "Lottery".

#### 2. Lotteries ☞3

A pin ball game which could be played on machine by only one person at a time was not a "lottery" so as to subject machine to seizure and destruction. Pen.Code, §§ 319, 335a.

#### 3. Gaming ☞58

The amusement of a free game on a pin ball machine, obtainable by making high score which automatically released coin slot without additional deposit, was not "merchandise", "money", "checks", or "tokens" redeemable in or exchangeable for any other thing of value within gaming statute, and hence machine was not subject to

seizure and destruction as a "gambling device". Pen.Code, §§ 330a, 335a.

See Words and Phrases, Permanent Edition, for all other definitions of "Check", "Gambling Device", "Merchandise", "Money" and "Token".

#### 4. Statutes ☞188, 190

Where language of statute is free from ambiguity when words used are given their ordinary and usual meaning, court should not look further in interpretation of statute, and should not change its effect by giving some unusual or seldom used meaning.

#### 5. Statutes ☞241(1)

Crimes are not to be built up by courts with aid of inference, implication and strained interpretation.

#### 6. Statutes ☞241(1)

Penal statutes must be construed to reach no further than their words, and no person can be made subject to them by implication.

#### 7. Gaming ☞58

The "representative or article of value" obtained through high score on pin ball machine, to make machine a "gambling device" under statute, must be some material or tangible "thing" of value, and securing amusement of free game, with nothing more, does not come within such definition. Pen.Code, § 330a.

A "representative" is one that represents; a person or thing that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, or replaces, or is equivalent to, another person or thing; a typical embodiment; type. The usual and ordinary meaning of "article" is some material or tangible object, although occasionally it may be used to refer to something immaterial. A "thing" is an inanimate object as contradistinguished from person.

See Words and Phrases, Permanent Edition, for all other definitions of "Article", "Representative", "Representative or Article of Value" and "Thing".

#### 8. Gaming ☞58

The amusement of free game on pin ball machine, obtainable by making high score which automatically released coin slot without additional deposit, was not a "representative or article of value", and hence machine was not subject to seizure and destruction as a "gambling device". Pen. Code, §§ 330a, 335a.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by I. B. Gayer against Thomas Whelan, District Attorney of San Diego County, for the possession of pin ball machines seized as lottery or gambling devices. From a judgment for plaintiff, defendant appeals.

Affirmed.

Thomas Whelan, Dist. Atty., and Duane J. Carnes, Deputy Dist. Atty., both of San Diego, for appellant.

Morris Lavine, Arthur Mohr, and Charles W. Lyon, all of Los Angeles, and Swing & Swing, of San Bernardino, for respondent.

#### MARKS, Justice.

This is an appeal from a judgment ordering the return to plaintiff of fourteen pin ball machines which defendant, in his capacity as district attorney of San Diego County, had seized and proposed to destroy under the provisions of section 335a of the Penal Code.

The parties agree that the findings are supported by the evidence and fairly present the issue raised on this appeal. Therefore we will look to the findings for a brief summary of the facts.

Plaintiff owned fourteen pin ball machines which were placed in various business houses in the city of Escondido for operation by the public. On October 29, 1941, defendant, in his capacity as district attorney of San Diego County, seized them as lottery or gambling devices and gave notice of his intention to summarily destroy them. Plaintiff brought this action to recover their possession and was given judgment. The trial court found:

"That said machines and each of them were slot machines, contrivances and mechanical devices which were played and operated by placing and depositing therein coins, by means whereof and as a result of the operation of which it was possible in part by skill in such operation but mainly by hazard and chance in the result of such operation to win the opportunity to thereafter play one or more free games, that is to further operate the machine or contrivance without the deposit or placing therein of any additional coin or coins.

"That no merchandise, money, representative or articles of value, checks or tokens, redeemable in, or exchangeable for

money or any other thing of value, was won or lost or taken from or obtained from such machines, nor was anything so won, lost or obtained except free games hereinabove referred to; that said free games were represented upon said machines by means of an electric light illuminating a number which showed the number of free games won; that said free games were obtained from said machines by automatic release of the coin slot attached to the machines, thereby permitting the winner to play said free games without depositing additional coins in the machines in payment therefor; that the players of said machines did not obtain therefrom any tangible tokens, checks, tickets or other physical representative or token of value."

Defendant maintains that the foregoing findings do not support the judgment for the reason that the free games that could be won on the machines represented such an award of value that it brought their operation within the statutes prohibiting lotteries and gambling on such devices. This is the sole question presented on this appeal. It is one of first impression in California under the precise facts before us.

The operation of a similar machine is clearly and briefly described in *Middlemas v. Strutz*, 71 N.D. 186, 299 N.W. 589. Reference to that description makes it unnecessary to repeat it here.

While there are no cases precisely in point in California, counsel have been diligent in citing authorities from other jurisdictions. The decisions on the question involved are in conflict. Among many cases cited by defendant are, *Middlemas v. Strutz*, supra; *People v. Gravenhorst*, City Ct., 32 N.Y.S.2d 760; *State v. Wiley*, Iowa, 3 N.W.2d 620; *Kraus v. City of Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159; *In re Sutton*, 148 Pa.Super. 101, 24 A.2d 756; *Steeley v. Commonwealth*, 291 Ky. 554, 164 S.W.2d 977; *People v. One Pinball Machine*, 316 Ill.App. 161, 44 N.E.2d 950; *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715.

It is conceded that where the machine returns tokens, money, or other articles that may be redeemed for something of value or used to replay the device, as a reward for the player making a high score, or when he may receive money in exchange for a high score, the machine is a gambling device coming within the provisions of the majority of the statutes. A study of many of the cases relied on by defendant discloses the existence of such

pay-offs which distinguish them from the instant case and eliminates them from further mention. The only cases we have discovered, relied on by defendant, in which there was not some form of a pay-off following a successful game, are, *Middlemas v. Strutz*, supra; *State v. Wiley*, supra; *Steeley v. Commonwealth*, supra; *People v. One Pinball Machine*, supra, and *Giomi v. Chase*, supra.

The *Middlemas* case turns upon the definition of the word "effects" which is used in the prohibitory statute of North Dakota. The court held that the right to a free game came within the definition of "effects" and therefore made the machines gambling devices. Our statute is not so broad and contains no such language.

*State v. Wiley*, supra, turns on the language of the Iowa statute which classes as a gambling device "any slot machine or device with an element of chance attending such operation". No such provision appears in the California statute.

We are not able to distinguish *Steeley v. Commonwealth*, supra, *People v. One Pinball Machine*, supra, and *Giomi v. Chase*, supra, from the instant case. They support the position of defendant except perhaps for the difference in rules governing statutory construction prevailing in those jurisdictions and in California.

Plaintiff has been careful not to cite any case in which it appears that there was any kind of a pay-off in connection with the operation of the machine. He cites, among other cases, *People v. Jennings*, 257 N.Y. 196, 177 N.E. 419; *State v. Waite*, 156 Kansas, 143, 131 P.2d 708; and *In re Wigton*, 151 Pa.Super. 337, 30 A.2d 352. *People v. Jennings* merely holds that where the high score obtained by the player only entitles him to the amusement of additional free games, there is no reward of sufficient value to bring the machine within the definition of a gambling device. *State v. Waite*, supra, *In re Wigton*, supra, and *Commonwealth v. A Certain Gambling Device*, 151 Pa.Super. 346, 30 A.2d 357, seem to be exactly in point with the instant case. They hold that the reward of free games for a high score is not of material value and does not bring the pin ball machine within the definition of a gambling device.

Little can be gained by further review of cases from other jurisdictions. However, before passing this phase of the case, it should be observed that in practically all



of the cases cited by defendant it has been said that the reward of free games for a high score is a thing of sufficient value to render the machine a gambling device or lottery. With few exceptions this is dicta in the opinions in which it appears.

Section 335a of the Penal Code provides in effect that after due proceedings taken, any peace officer may seize and destroy any machine or device, the possession or control of which is penalized by the state laws prohibiting lotteries or gambling. Defendant maintains his right to destroy the pin ball machines because their possession is penalized by both the lottery and gambling laws of the state.

Section 319 of the Penal Code defines a lottery as follows: "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

[1] It is at once apparent from the clear language of the section that in order to constitute a lottery two or more persons must have paid or promised to pay a consideration for the chance of obtaining the prize or a part of it or a share or an interest in it to be distributed by lot or chance between or among them.

[2] This definition excludes the pin ball game from consideration as a lottery. But one person can play or operate it at a time. That person places his nickel in the slot and he alone operates the machine. He alone reaps the reward of a free game or games. There is no distribution of the reward, if any, as it must be enjoyed by the one player. There is neither opportunity for contribution to the fund for the right to play, nor any chance for distribution of the reward among several who might have paid a required fee for such a privilege. This clearly eliminates the pin ball machine from consideration as a lottery device, as defined in the statute, without consideration of the question of the free game being "property".

Defendant relies on the case of *People v. Settles*, 29 Cal.App.2d Supp. 781, 78 P.2d

274, as supporting his argument that the pin ball machine is a lottery device. The statement of facts in the *Settles* case is too brief for us to determine the exact nature of the game there held to be a lottery. The court stated that to a certain point the game resembled that of *Tango* as described in *People v. Babdaty*, 139 Cal.App.Supp. 791, 30 P.2d 634. From this description we conclude that the game involved in *People v. Settles*, and there held to be a lottery, bears no resemblance to the pin ball games we have here so that case cannot be considered as authority here.

Section 330a of the Penal Code provides in part as follows: "Every person, who has in his possession or under his control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building owned, leased or occupied by him, or under his management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or article of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from such machine, when the result of action or operation of such machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, \* \* \* is guilty of a misdemeanor, \* \* \*."

The first requirement of the section is that the mechanical device be operated by money or other thing of value which is risked or hazarded by the player. That requirement is met by the pin ball machine which is operated by the deposit of a nickel in its mechanism. The remaining question is this: Does the amusement afforded by a free game, or games, awarded the player for a high score amount to "merchandise, money, representative or articles of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value"? The existence of at least one of these factors is made necessary by the statute in order to classify the machine a gambling device.

[3] Certainly the amusement of a free game is neither merchandise nor money nor checks nor tokens redeemable in or exchangeable for any other thing of value. Merchandise and money are tangible articles that do not include the intangible amusement of a free game. Their definitions are too clear and well known to require argument supporting this conclusion. The same should be true of checks or tokens redeemable or exchangeable for money or any other thing of value. Those checks or tokens must of necessity be at least material or visible in order to be exchangeable.

In some cases from other jurisdictions it appears that the high score was shown in illuminated numbers on the machine and the player was rewarded by the delivery of money or merchandise thereby won. Such transactions were held to be sufficient to bring the machines within the prohibitions of the law. Here nothing of the kind occurred. The machine registered the score but the player received nothing in exchange for it but the right to continue the game. He received no check or token that he could exchange for anything.

Defendant maintains that the language of the section, "or as a result of the operation of which any \* \* \* representative or article of value \* \* \* is won or lost", is broad enough to include the amusement of a free game.

In support of this argument he relies on what was said in the cases already cited, to the effect that a free game giving amusement to the player is something of sufficient value to render the machine a gambling device. He argues that the words "representative or articles of value" have the precise meaning of "things of value", and concludes that the free game was a representative or article of value under the cases already cited. He bases his argument on the fourth definition of "article" in the New English Dictionary, Oxford, 1888, Vol. 1, page 471, which is as follows: "A separate thing (immaterial or material)" and on the following definition in Century Dictionary, 1911: "Article. \* \* \* 6. A material thing as part of a class, or absolutely, a particular substance or commodity: as an article of merchandise; an article of clothing; salt is a necessary article. 7. A particular immaterial thing; a matter."

In Webster's New International Dictionary, "representative" is defined as follows: 1. "One that represents; a person or thing

that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent to, another person or thing; a typical embodiment; type."

The usually accepted definition of "thing" is an inanimate object as contradistinguished from person. Black's Law Dictionary 3d Ed. Applying these two definitions to the facts here would indicate that in order to constitute the pin ball machine a gambling device, in so far as the use of the word "representative" in section 330a of the Penal Code is concerned, the numbers displayed when a high score is obtained would have to represent or stand for some inanimate object which the player would receive as a reward for the high score. The trial court found that the player received no such thing and certainly the right to the amusement of a free game cannot be classed as such inanimate object.

In *Junge v. Hedden*, 146 U.S. 233, 13 S.Ct. 88, 89, 36 L.Ed. 953, it was said: "In common usage, 'article' is applied to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity." In *People v. Epstein*, 102 Misc. 476, 170 N.Y.S. 68, "article" was held to mean a particular object or substance, a material thing or class of things. See, also, *Carter v. Wilmington, etc., Co.*, 126 N.C. 437, 36 S.E. 14; *Junge v. Hedden*, C.C., 37 F. 197; *Harrison Supply Co. v. United States*, 1 Cir., 171 F. 406.

It would therefore seem that the usual and ordinary meaning of the word "article" is some material or tangible object, although, according to the definitions submitted by defendant, occasionally it may be used to refer to something "immaterial".

[4] It is a cardinal rule of statutory construction that where the language of a statute is free from ambiguity, when the words used are given their ordinary and usual meaning, the courts should not look further in its interpretation and should not change its effect by giving the words some unusual or seldom used meaning. *Bagg v. Wickizer*, 9 Cal.App.2d 753, 50 P.2d 1047; *Taylor v. Lundblade*, 43 Cal.App.2d 638, 111 P.2d 344; *People v. Stanley*, 193 Cal. 428, 225 P. 1; *Pacific Coast Dairy v. Police Court*, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217. Here we find no reason to ascribe to the word "article" the rather unusual de-

inition which defendant would have us give it.

[5, 6] As was said in *People v. Garcia*, 37 Cal.App.2d Supp. 753, 98 P.2d 265, 269: "As we said in *People v. Zimbrot*, 1939, [35 Cal.App.2d Supp. 745, 747], 91 P.2d 252, 253, 'Crimes are not to be "built up by courts with the aid of inference, implication, and strained interpretation." Ex parte McNulty, 1888, 77 Cal. 164, 168, 19 P. 237, 239, 11 Am.St.Rep. 257, and "penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication". Ex parte Twing, 1922, 188 Cal. 261, 265, 204 P. 1082, 1084.'"

[7, 8] Under the foregoing rules of statutory construction we are required to hold that the clause of section 330a of the Penal Code, under consideration, must mean that the representative, or article of value, obtained through a high score on the pin ball machine, must be some material or tangible thing of value, and that securing the amusement of a free game or games on the machine, and nothing more, does not come within that definition and is not within the prohibition of the section.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



59 Cal.App.2d 295

**SAYLES v. LOS ANGELES COUNTY et al.**  
Civ. 13879.

District Court of Appeal, Second District,  
Division 3, California.

June 23, 1943.

#### 1. Taxation ☞98

The doctrine "*mobilia sequuntur personam*" is no longer a conclusive guide as to tax situs of tangible personalty, which is now taxable, by statute or otherwise, in locality wherein it has established permanent situs, irrespective of owner's domicile.

See Words and Phrases, Permanent Edition, for all other definitions of "*Mobilia Sequuntur Personam*".

#### 2. Taxation ☞98

The legal situs of ocean-going vessel for purpose of taxation is in her home port, and for such purpose she is deemed to be in such place and taxable only within state wherein such place is situated.

#### 3. Taxation ☞98

An ocean-going vessel, indefinitely and exclusively employed within waters of another state than that in which her home port is situated, may thereby acquire actual situs in such other state, so as to be taxable therein.

#### 4. Taxation ☞98

The owner of ocean-going vessel has no power to give it taxable situs by arbitrary selection of home port which is neither his domicile nor that of vessel's actual situs, but situs of owner's domicile must yield to actual situs arising from owner's act in giving vessel permanent location elsewhere.

#### 5. Taxation ☞260

Taxation of tangible personalty as between different counties in state is governed by substantially same rule as that governing taxation of such personalty as between different states or countries.

#### 6. Taxation ☞98

The situs of personal property for taxation is in first instance a fact question to be resolved on consideration of all circumstances bearing on matter.

#### 7. Taxation ☞543(5)

In action against county for amount of taxes paid by plaintiff under protest on ocean-going tug, where complaint alleged that tug never acquired tax situs in state and answer alleged that tug had tax situs in state and defendant county only, parties were in no position to claim on appeal that trial court's final conclusion as to tug's tax situs was anything other than finding of ultimate fact.

#### 8. Trial ☞404(2)

In action against county for amount of taxes paid under protest on ocean-going tug, trial court's declaration as to place of tug's tax situs must be regarded as finding of ultimate fact, though misplaced among court's conclusions of law.

#### 9. Trial ☞404(3)

Generally, trial court's findings of probative facts will not control, limit, or modify



his findings of ultimate facts, nor tend to establish that ultimate facts were found against evidence, unless ultimate findings are necessarily based on, and completely overcome by, probative findings.

**10. Trial** ⇐395(5)

A trial court's ultimate finding of fact, drawn as conclusion from probative facts previously found, cannot stand if specific facts on which it is based do not support it.

**11. Trial** ⇐395(5)

In action against county for amount of taxes, paid by plaintiff under protest, on ocean-going tug, evidentiary facts, found by trial court, that plaintiff resided, and tug was registered, at Ketchikan, Alaska, that charter of tug by plaintiff to corporation required plaintiff to furnish crew and supplies and keep tug in operating condition, that all but two of five places to which tug made trips for charterer were in other counties, and that tug went entirely outside state in making such trips, supported court's ultimate fact finding that tug had no tax situs elsewhere than at Ketchikan and hence was not taxable by defendant county. Pol.Code, §§ 3938, 3950, 3964.

**12. Appeal and error** ⇐1011(1)

The trial court's ultimate fact finding on conflicting evidence is binding on District Court of Appeal.

**13. Evidence** ⇐10(1)

The District Court of Appeal takes judicial notice that Point Dume is in Los Angeles county.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by James E. Sayles against the County of Los Angeles and another to recover the amount of personal property taxes paid by plaintiff under protest. Judgment for plaintiff, and defendant county appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Arch E. Ekdale and J. F. Harvey, both of San Pedro, for respondent.

SHAW, Justice pro tem.

The defendant County of Los Angeles appeals from a judgment for plaintiff in an action to recover taxes paid under pro-

test. The appeal is presented on the judgment roll alone. The facts herein stated appear from the findings. At all material times, the plaintiff here was the owner of an ocean-going tug named "Eskimo" and was a resident of Ketchikan, in the Territory of Alaska, and the tug was registered at the same place. On November 14, 1938, plaintiff chartered this tug to Philip R. Park, Inc. (referred to herein as "Park"), a corporation, whose principal place of business was in the county of Los Angeles. By the terms of the charter plaintiff was required to maintain the tug in good working order, provide it with fuel, lubrication, etc., and furnish a captain and engineer to operate it, but the tug was to be under the direction, supervision and control of Park. This charter covered the period from November 14, 1938, to February 1, 1940, and on the latter date was renewed for one year, with the option of further renewal for five years. This option was not exercised, and the tug returned to Ketchikan.

During the life of the charter, Park used the tug to tow an ocean-going kelp-cutting barge owned by it between the Port of San Pedro, in the County of Los Angeles, and "kelp beds lying off the California coast" and to cut or harvest kelp therefrom, for which Park had a license from the State of California. These kelp beds "were located immediately adjacent to San Nicholas Island, Santa Cruz Island, Point Dume, and San Mateo Point." From this it is to be inferred, but was not found, that they were within three miles of the coast, and hence within the State of California. Ten or twelve trips between San Pedro and the kelp beds were made each month. "The average time consumed therein was 24 hours in port and 36 to 40 hours at sea."

While the tug was so employed, on July 1, 1940, it was assessed by defendant County for taxes. Plaintiff refused to pay the taxes and demanded that Park do so. When Park also refused to pay, plaintiff paid the taxes under protest, and by the judgment herein has been awarded their recovery.

[1-3] The parties here are substantially agreed on the governing rule of law relating to the taxability of the tug in the County of Los Angeles, but they disagree on its application to the facts above stated. The rule applicable to tangible personal property generally was thus stated in Brock & Co. v. Board of Supervisors, 1937, 8 Cal.2d 286, 289, 290, 65 P.2d 791, 793, 110 A.L.R.

700: "The doctrine *mobilia sequuntur personam* is no longer a conclusive guide as to the situs for tax purposes of tangible personalty, and such property now, by statute or otherwise, is taxable in the locality where it has an established permanent situs, irrespective of the owner's domicile. [Citing authorities.] \* \* \* the requirement of permanency must attach before tangible property which has been removed from the domicile of the owner will attain a situs elsewhere." The application of this rule to the special case of ocean-going vessels was considered in *Olson v. San Francisco*, 1905, 148 Cal. 80, 83, 84, 82 P. 850, 851, 2 L.R.A., N.S., 197, 113 Am.St.Rep. 191, 7 Ann.Cas. 443, where the court said: "It appears to be thoroughly settled that the legal situs of such a vessel for the purpose of taxation is in her home port, and that her physical absence therefrom cuts no figure. For such purpose she is deemed to be at such place, and is taxable only within the state in which such place is situated. [Citing authorities.] It is held that such a vessel may, by being indefinitely and exclusively employed within the waters of another state, acquire an actual situs therein which will permit of her taxation there [citing cases]; but this conclusion is founded on the proposition that by actual use the vessel has acquired a permanent actual situs in another state, and is no longer actually engaged in foreign or interstate commerce, except within the limits of such state." The same rule was applied to vessels in California, etc., *Co. v. San Francisco*, 1907, 150 Cal. 145, 88 P. 704; and *San Francisco v. Talbot*, 1883, 63 Cal. 485, 488. It is to be noted that, by the United States shipping laws, as they stood at the time of these decisions, the home port of a vessel was that at or nearest which the owner, or managing owner, resided. See *Ayer & Lord Tie Co. v. Kentucky*, 1906, 202 U.S. 409, 419, 26 S.Ct. 679, 50 L.Ed. 1082, 1086, 6 Ann.Cas. 205; Sec. 17, 46 U.S.C.A.

[4] Dealing with this subject, the United States Supreme Court, in *Southern Pacific Co. v. Kentucky ex rel. Alexander*, 1911, 222 U.S. 63, 67, 68, 32 S.Ct. 13, 14, 56 L.Ed. 96, 98, said: "The owner has no power to give his vessel a taxable situs by the arbitrary selection of a home port which is neither his domicile nor the domicile of actual situs. \* \* \* Since, therefore, an artificial situs for purposes of taxation is not acquired by enrolment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the

owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. \* \* \* if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government." Accordingly, the court held that ocean-going steamers owned by a Kentucky corporation, but enrolled at the port of New York and regularly engaged in trips between that port and New Orleans exclusively, as well as others plying between New York and several other ports, were taxable in the State of Kentucky, which was the owner's domicile.

In *Ayer & Lord Tie Co. v. Kentucky*, supra, 1906, 202 U.S. 409, 423, 26 S.Ct. 679, 683, 50 L.Ed. 1082, 1087, 6 Ann.Cas. 205, the court thus stated the rule: "\* \* \* the power of taxation of vessels depends either upon the actual domicile of the owner or the permanent situs of the property within the taxing jurisdiction."

[5] The question before us covers not only the possible tax situs of the tug in California, but also the identity of the particular county where such situs would be; for substantially the same rule that governs the taxation of tangible personal property as between different states or countries, also prevails as between different counties in this state. *Rosasco v. County of Tuolumne*, 1904, 143 Cal. 430, 433, 77 P. 148; *City of Oakland v. Whipple*, 1870, 39 Cal. 112, 115; *People v. Niles*, 1868, 35 Cal. 282, 287.

[6-8] The question of the situs of personal property for taxation is, in the first instance, one of fact, to be resolved on a consideration of all the circumstances bearing upon the matter. *Atlantic Maritime Co. v. City of Gloucester*, 1917, 228 Mass. 519, 527, 117 N.E. 924, 926. The facts above stated, which appear in the findings, include several such circumstances and are all evidentiary in nature. From them the final conclusion as to the situs of the tug for taxation, the ultimate fact, must be drawn. As stated in the case just cited, this may be, at times, a mixed question of law and fact. But the parties here are in no position to claim that it is anything other than an ultimate fact. Plaintiff, in his complaint, after setting forth some evidentiary matters, but not all of those above stated, alleged, "that said vessel, according to plaintiff's information and belief has never acquired a situs for tax purposes in Cali-

fernia; that the situs for tax purposes is Ketchikan, Alaska." In its answer defendant County denied some of the evidentiary matters alleged by plaintiff, and alleged affirmatively "that at or about November 14, 1938 said tug 'Eskimo' acquired, and ever since and at all times in said complaint mentioned has had, a situs for tax purposes in the State of California and in the County of Los Angeles, and, ever since said date and at all times in said complaint mentioned, has not had any situs for tax purposes at Ketchikan, Alaska, or outside of the City of Los Angeles and County of Los Angeles." Having thus agreed that an allegation of the "situs for tax purposes" is one of ultimate fact, the parties cannot now disown it as such. *Fitzpatrick v. Underwood*, 1941, 17 Cal.2d 722, 729, 112 P.2d 3. Looking for such ultimate fact in the findings, we discover it, not among the propositions of fact there stated, but in a conclusion of law which declares: "That at all the times herein mentioned the plaintiff's said tug 'Eskimo' had, and now has, no tax situs anywhere except at Ketchikan, Alaska." Under the circumstances, this declaration is to be regarded as a finding of fact, and it does not lose its character as such because it is misplaced among the conclusions of law. 24 Cal.Jur. 961 and cases cited; *Linberg v. Stanto*, 1931, 211 Cal. 771, 776, 297 P. 9, 75 A.L.R. 555; *Gossman v. Gossman*, 1942, 52 Cal.App.2d 184, 193, 126 P.2d 178.

[9,10] There remains for our consideration the question whether this finding, which purports to be a conclusion from the evidentiary facts already stated, is overcome thereby. "It is the general rule that \* \* \* findings of probative facts will not control, limit or modify the finding of ultimate facts, or tend to establish that the ultimate facts were found against the evidence, unless the ultimate findings are necessarily based on the probative findings and are completely overcome." *Fitzpatrick v. Underwood*, supra, 1941, 17 Cal.2d 722, 727, 112 P.2d 3, 6; to same effect, see *Loud v. Luse*, 1931, 214 Cal. 10, 12, 3 P.2d 542; *Hammond Lumber Co. v. Barth Investment Corp.*, 1927, 202 Cal. 606, 609, 262 P. 31. But "\* \* \* an ultimate finding of fact which is drawn as a conclusion from the probative facts previously found cannot stand if the specific facts upon which it is based do not support it." *Lee v. Hibernia, etc., Soc.*, 1918, 177 Cal.

656, 659, 171 P. 677, 678; to same effect see cases there cited, and *Falk v. Falk*, 1941, 48 Cal.App.2d 762, 769, 770, 120 P.2d 714.

[11-13] We are of the opinion that the evidentiary facts set forth in the findings and above stated do support the finding above quoted that the tug had no tax status elsewhere than at Ketchikan. It may be that a contrary finding also could be supported by these facts; but if so, we have only the familiar situation where the evidence is conflicting, and the trial court's decision upon it is binding upon us. The first facts appearing are that plaintiff resided and the tug was registered at Ketchikan. Without more, these facts would require the conclusion that it was taxable there, under the rules already stated. We find nothing in the other facts stated which must necessarily upset this conclusion. The charter did not completely turn the tug over to Park to be used as its own property; on the contrary, it required plaintiff to furnish the crew and supplies for the tug and keep it in operating condition. In view of those requirements, all that Park could do by way of direction, supervision and control was to direct when and where the tug should be used. It does not appear to have lain idle very much, or to have been kept in any one place when at work. One of the kelp beds to which it made trips, that off San Nicholas Island, was in Ventura County, Pol.Code, sec. 3964; another, off Santa Cruz Island, was in Santa Barbara County, Pol.Code, sec. 3950; a third, at Point San Mateo, was at or near the boundary line between Orange and San Diego Counties, Pol.Code, sec. 3938; and only the fourth, that off Point Dume, could have been in Los Angeles County. We take judicial notice that Point Dume is in that county, and this kelp bed must have been in that county if, as found, it was "immediately adjacent to" that point. Thus, only two of the five places at which, according to the findings, the tug spent its time, were in Los Angeles County and we have no information as to the proportions of its time spent in the various places. Moreover, it is plain that it must have gone entirely outside the State of California when going to and from the islands above mentioned; and it may have done so in going to the other places, but as to that the findings are silent. The original charter was for only 14½ months. It was renewed for one year, and while



there was an option for a further term of five years, it was not exercised and can have little effect on the situs of the tug. Upon all the facts, the question whether the tug had acquired a permanent situs away from Ketchikan, as it must, under the authorities already cited, in order to be taxable elsewhere, was a debatable one. If the trial court had regarded these various matters as sufficient to overcome the inference arising from plaintiff's residence and the registration of the tug, its action might have been binding upon us; but their tendency in that direction was not so strong that the trial court was required so to regard them.

Defendant relies to a considerable extent on *Old Dominion S. S. Co. v. Virginia*, 1905, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, '3 Ann.Cas 1100; but, as stated in *Southern Pacific Co. v. Kentucky ex rel. Alexander*, supra, 1911, 222 U.S. 63, 72, 32 S.Ct. 13, 16, 56 L.Ed. 96, 100, " \* \* \* in that case the judgment was rested upon the fact that the vessels had for years been continuously and exclusively engaged in the navigation of the Virginia waters, which state had thereby acquired jurisdiction for imposing a tax as upon property which had become incorporated into the tangible property within her territory." No such state of facts exists here.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



59 Cal.App.2d 437

**EAST-WEST DAIRYMEN'S ASS'N v.  
DIAS et al.  
Civ. 12446.**

District Court of Appeal, First District,  
Division 2, California.

June 28, 1943.

#### 1. Agriculture ⚡6

An agreement by member of cooperative dairy organization to be bound by its by-laws and subsequent amendments there-to is valid, and such member is bound by

all reasonable amendments that may be thereafter adopted.

#### 2. Venue ⚡7

For the purpose of determining venue in action brought by dairy association against a member to recover damages for breach of contract to sell member's products to the association, place of performance was as effectively fixed by the by-laws of the association as though such place had been expressly fixed in the contract, and where by-laws provided for performance in county in which association conducted its business, action was properly brought in such county. Code Civ.Proc. § 395.

#### 3. Venue ⚡70

Where complaint contained all necessary allegations concerning place of performance of contract in county where action was brought, facts stated in defendant's affidavit in support of motion for change of venue were not required to be accepted as true, by plaintiff's failure to file counter affidavit, since allegations of complaint may be considered in opposition to motion for change of venue. Code Civ.Proc. § 395.

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by East-West Dairymen's Association (a nonprofit corporation), against E. R. Dias and others to enjoin the named defendant from disposing of his dairy products to persons other than plaintiff and to recover damages for alleged failure to continue delivering dairy products to plaintiff as provided by contract. From an order denying his motion for change of venue, the named defendant appeals.

Affirmed.

Gregory P. Maushart, of Los Banos, for appellants.

T. B. Scott, of Modesto, for respondent.

SPENCE, Justice.

This is an appeal by defendant Dias from an order denying his motion for change of venue from Stanislaus County to Merced County.

Plaintiff, a nonprofit cooperative marketing organization, brought this action seeking to enjoin defendant Dias from disposing of his dairy products to persons other than plaintiff and to recover damages for

the alleged failure and refusal by said defendant to continue delivering his dairy products to plaintiff as provided in his "Member's Contract". The verified complaint set forth pertinent portions of the articles of incorporation and by-laws of the association together with the "Member's Contract" signed by defendant Dias. It was alleged that the existing by-laws provided that "Each member agrees to sell and deliver to the Association's plant in Newman, County of Stanislaus, State of California, all the milk and cream produced or controlled by such member \* \* \*", and that "Each member's obligation so to market all milk and cream produced and controlled by him shall continue in force and effect for a period of ten years", and thereafter until the filing by the member with the secretary of notice of desire to withdraw from the association. The "Member's Contract" was alleged to have been signed by defendant Dias in 1933 and to have read in part as follows: "The undersigned, a member of East-West Dairymen's Association, a corporation, organized and existing under the laws of the State of California, hereby agrees to avail ourselves of the facilities of said corporation, and states that he has read and is familiar with the articles of incorporation and by-laws of said corporation, and hereby ratifies and adopts the same, and in consideration of our membership in said corporation, hereby agrees to be bound by each provision, agreement and contract therein contained, by any changes or amendments thereto, and by the rules and regulations heretofore or to be hereafter adopted by said corporation \* \* \*". It was further alleged "that said Member's Contract has never been terminated or ended and is now in full force and effect and said defendant Dias is now and ever since February 23, 1933 has been a member of said plaintiff corporation."

Defendant Dias filed a demurrer and a notice of motion for change of venue to Merced County. It was stated therein that the motion would be made upon the ground that defendant was and had at all times been a resident of Merced County and that the motion would be made upon "this notice, the papers on file in this case and the affidavit of said defendant, a copy of which affidavit is being served herewith." Said affidavit contained the usual allegations as to the merits and as to the residence of defendant. A second affidavit

was thereafter filed by defendant in which he alleged that the complaint of plaintiff was "untrue" in certain respects. Defendant alleged therein that while he was a member, he received copies of the by-laws which read differently from those set forth in plaintiff's complaint in that said copies did not specify any fixed place for performance by the members. He then alleged that "never at any time while he was a member of said organization was there any provision in any of its by-laws for the delivery of milk or cream at any specific or specified place." This last mentioned allegation was neither a direct allegation that defendant's membership had terminated nor a direct allegation that no such by-law had ever been adopted during the period covered by the "Member's Contract". But giving every possible effect which may be claimed for said allegation, the most that can be said is that it was in conflict with the allegations of plaintiff's verified complaint on the matters to which it related. For the purpose of determining the motion for change of venue, it was the function of the trial court to determine the facts from the conflicting evidence before it.

Defendant contends that the trial court erred in denying his motion for change of venue to the county of his residence. He cites and relies upon section 395 of the Code of Civil Procedure. But that section reads in part: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[1,2] It seems to be conceded that if defendant's "Member's Contract" had provided in express terms for performance by defendant at Newman in Stanislaus County, the order denying the motion for change of venue from Stanislaus County to Merced County would have been proper. But defendant argues that said contract was silent as to the place of performance and that the County of Merced, being the place where the contract was made, must

therefore be "deemed to be" the county in which it was to be performed. This argument, however, overlooks the fact that the "Member's Contract" did not purport to set forth in detail the agreement of the parties but it incorporated by reference all provisions of the by-laws of the association and all "changes or amendments thereto". An agreement by a member of a cooperative organization to be bound by its by-laws and subsequent amendments thereto is a valid provision and such member is bound by all reasonable amendments to the by-laws that may be thereafter adopted. *Witney v. Farmers' Co-op. Grain Co.*, 110 Neb. 157, 193 N.W. 103; *Farmers' Mutual Ins. Co. v. Kinney*, 64 Neb. 808, 90 N.W. 926; *Hall v. Western Travelers' Acc. Ass'n*, 69 Neb. 601, 96 N.W. 170. No claim is made that it was improper to cover the subject of the place of performance in the by-laws nor is it suggested that Newman, the place specified in the by-laws as set forth in plaintiff's complaint, was an unreasonable place to specify for the place of performance. Under these circumstances, we believe it immaterial that the "Member's Contract" did not expressly specify the place of performance for the effect of that contract, under the authorities cited, was to incorporate within its terms all provisions of the then existing by-laws and all reasonable amendments which might be subsequently made thereto. In other words, for the purpose of determining venue in any action brought under said contract, the place of performance was as effectively fixed by the by-laws as though such place had been expressly fixed in the contract itself or by a provision in the contract expressly permitting the other party to fix any reasonable place for performance. It therefore appears that the authorities which dealt with the ordinary cases involving contracts which were silent as to the place for performance are not applicable here.

[3] Defendant further argues that as no counter-affidavit was filed by plaintiff in opposition to the motion for change of venue, the facts stated in defendant's affidavits in support of the motion must be accepted as true. The only authority cited in support of this argument is *O'Brien v. O'Brien*, 16 Cal.App. 103, 116 P. 692. But that case involved the question of the residence of the defendant and it does not appear that any allegation with respect to such residence was contained in the com-

plaint. In the present case, the motion was made on "the papers on file in this case", which papers included plaintiff's verified complaint. Said complaint contained all the necessary allegations concerning the place of performance to make Stanislaus County a proper county. There could be no purpose in requiring plaintiff to file a counter-affidavit repeating said allegations of the verified complaint as the authorities indicate that such allegations, contained in the verified complaint, may be considered in opposition to a motion for change of venue. *Kiku Saito v. Policy Holders' L. Ins. Ass'n*, 132 Cal.App. 412, 22 P.2d 724; *Lakeside Ditch Co. v. Packwood Canal Co.*, 50 Cal.App. 296, 195 P. 284; *State v. District Court*, 55 Mont. 330, 176 P. 613.

The order denying the motion for change of venue is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.



59 Cal.App.2d 361

**RICHARDSON, Superintendent of Banks, v. MICHEL et al.**  
Civ. 13987.

District Court of Appeal, Second District,  
Division 2, California.  
June 25, 1943.

Hearing Denied Aug. 23, 1943.

#### 1. Appeal and error ⇐1198

Where judgment for plaintiff in action to set aside certain transfers as fraudulent was reversed on appeal for retrial on issue of statute of limitations, and on retrial judgment was entered for defendants on that issue, including in judgment a finding that the transfers were fraudulent and conveyed no title was improper, since trial court had no discretion but to comply with order reversing original judgment and to enter judgment for defendants. Code Civ. Proc. § 338, subd. 4.

#### 2. Limitation of actions ⇐168

When a court has reached conclusion that an action is barred by the statute of limitations, from that moment plaintiff is without any right of recovery with respect



to any demand made by his pleading. Code Civ.Proc. § 338, subd. 4.

### 3. Costs ⇐32(1)

In action to set aside conveyance of real estate on ground of fraud, where court found that transfers were fraudulent but judgment was entered for defendants on issue of statute of limitations, plaintiff was improperly awarded his costs, since action involved title to real estate and statute required that costs be awarded to prevailing party. Code Civ.Proc. §§ 338, subd. 4, 1032.

### 4. Costs ⇐266

Where judgment for plaintiff in action to set aside conveyance of real estate on ground of fraud was reversed on appeal and such reversal made no provision for award of costs to plaintiff in event defendants prevailed on second trial, defendants' recovery on a meritorious defense entitled them not only to be relieved of payment of costs of their adversary, but to recover their own costs. Code Civ.Proc. § 1032.



Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Friend W. Richardson, Superintendent of Banks of the State of California, against Herman Michel and others, to set aside certain transfers made by the defendant named as fraudulent, wherein judgment for plaintiff was reversed on appeal for the determination of the issue of statute of limitations raised by defendants which was not tried. On retrial, judgment was entered for defendants on the issue of statute of limitations, and from so much of the judgment as further determined that the transfers were fraudulent, and conveyed no title, the defendants appeal.

Judgment modified and as modified affirmed.

See, also, 45 Cal.App.2d 188, 113 P.2d 916.

Clyde Doyle, of Long Beach, and Henry F. Walker, of Los Angeles, for respondent.

Ivan G. McDaniel and George C. Lyon, both of Los Angeles, for appellants.

MOORE, Presiding Justice.

This is the second appeal. The original judgment herein was entered to set aside conveyances alleged to have been fraudulently made by defendant, Herman Michel.

Prior to the filing of this action, plaintiff had obtained a money judgment against such defendant. At the conclusion of the first trial of this case the court made findings to the effect that all of the transfers of the property made by defendant, Herman Michel, to the Michel Investment Company were in fraud of creditors and were simulated transfers and were not intended to divest him of his ownership thereof. With reference to the plea of the statute of limitations, finding No. 22 was as follows:

"22. The causes of action in plaintiff's complaint are not, nor is any one of them, barred by the provisions of Section 338, Subd. 4, or of Section 318, or of Section 319, or of Section 338, Subd. 1 or 3, or of Section 341, Subd. 1, or of Section 343 or of Section 359 or of any other Section of the Code of Civil Procedure of the State of California, or by any Statute of Limitations."

Following the findings, the court concluded as follows:

"(1) Defendant Herman Michel is the owner of all of the said property, real and personal, which he purported to transfer to defendant Michel Investment Company.

"(2) The purported transfers from Defendant Herman Michel to Defendant Michel Investment Company were fraudulent and are absolutely void as against plaintiff herein.

"(3) Plaintiff is entitled to judgment requiring defendants to deliver up all of the property found under the foregoing Findings of Fact to belong to Defendant Herman Michel, so that so much thereof may be sold as may be necessary to satisfy said judgment in favor of plaintiff in said cause of Edward Rainey v. Herman Michel.

"(4) Plaintiff is entitled to an injunction against defendants restraining them, or any of them, from disposing or encumbering any of said property, real or personal, or any interest therein, until said judgment in said cause of Edward Rainey v. Herman Michel has been satisfied in full, together with plaintiff's costs in this present action.

"(5) Plaintiff is entitled to a decree appointing a Receiver to take possession of all of the real and personal property found by the foregoing Findings of Fact to belong to Defendant Herman Michel, and to sell so much thereof as shall be necessary to satisfy said judgment and plaintiff's costs herein." Pursuant to such conclusions, judgment was entered as follows:

(1) That the transfers by Herman Michel of the properties were fraudulent and void as to plaintiff and that as to plaintiff the title to the properties remained in defendant Herman Michel;

(2) That the transfer from Herman to the Michel Investment Company was simulated and was not intended to and did not pass the ownership;

(3) That plaintiff is entitled to have the properties subjected to the payment of a judgment held by plaintiff against Herman;

(4) That the amount of the judgment held by plaintiff against Herman is the sum of \$99,805.44 with interest and cost of the appeal of Herman from the money judgment;

(5) That a receiver is to be appointed for the properties and for satisfying the judgment held by plaintiff;

(6) That defendants are enjoined from disposing of or encumbering the properties until the money judgment of plaintiff shall have been fully satisfied;

(7) That upon the sale of any of the properties defendants are barred and foreclosed of any right, title, or interest in and to such properties.

On the appeal from the foregoing judgment (45 Cal.App.2d 188, 113 P.2d 916) the court determined against the appellants on all issues with respect to the alleged fraudulent conveyances and concluded that (45 Cal.App.2d at page 202, 113 P.2d at page 923) the fraud issue was thoroughly tried and that the findings on that issue were supported by overwhelming evidence; but that the issue as to the statute of limitations, in effect, was not tried at all; that "the respondent, if he so desires, should be permitted to amend his complaint, and the material facts should be ascertained and that issue decided upon the evidence produced.

"The judgment is reversed and the cause remanded for a retrial on the sole issue as to the statute of limitations, with directions to the trial court to make the appropriate finding, to enter judgment in favor of the defendants if the action is found to be barred by the statute, and if the contrary is found to enter judgment in favor of the plaintiff for the amount of the original judgment, with accrued interest."

The remittitur filed with the superior court following the order of reversal is as follows:

"The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

"It is ordered, adjudged, and decreed by the court that the judgment of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same is hereby reversed and the cause remanded for a retrial on the sole issue as to the statute of limitations, with directions to the trial court to make the appropriate finding, to enter judgment in favor of the defendants if the action is found to be barred by the statute, and if the contrary is found to enter judgment in favor of the plaintiff for the amount of the original judgment, with accrued interest. Appellants to recover costs on appeal."

At the second trial, the parties stipulated in open court as follows: "That a retrial of this action would result, under the decision of the District Court of Appeal, reversing the judgment heretofore rendered by the court, in a finding that the cause of action is outlawed by Section 338(4) of the Code of Civil Procedure."

Following the stipulation which was made in open court, the court made and filed an amendment to the findings and conclusions striking finding 22 as originally entered and in lieu thereof found as follows: "The causes of action in plaintiff's complaint are and each of them is barred by the provisions of section 338, subd. 4 of the Code of Civil Procedure."

Following such finding the court struck items 3, 4, and 5 contained in the original Findings and concluded as follows: "Plaintiff is not entitled to judgment against defendants or any of them for the reason that the claims of plaintiff against defendants, and each of them, are barred by the provisions of section 338, subdivision 4, Code of Civil Procedure, and defendants and each of them, are entitled to a decree giving judgment to defendants except that plaintiff is entitled to recover his costs therein in the sum of \$——."

The judgment entered following the amendments to the findings and the conclusions is as follows:

"Now, Therefore, It Is Ordered, Adjudged and Decreed, that:

"1. The transfer by defendant Herman Michel to defendant Michel Investment Company of the properties described in the

Findings of Fact herein, and purported transfer of the Stanislaus County Ranch from defendant Michel Investment Company to defendant Walter Michel, were, and each of them was fraudulent and void as to plaintiff herein, and as to plaintiff herein the title to said property is and remains in defendant Herman Michel.

"2. The said transfer from defendant Herman Michel to defendant Michel Investment Company was a simulated transfer and was not intended to and did not pass the ownership of the said property to Michel Investment Company.

"3. The claim of plaintiff against defendants, and each of them, is barred by the provisions of Section 338, Subdivision 4 of the Code of Civil Procedure of the State of California, and for that reason judgment is hereby given in favor of defendants, excepting that plaintiff shall recover his costs in the sum of \$59.15."

The notice of appeal filed by appellants is from the whole judgment except the part reading as follows:

"Now, Therefore, It Is Ordered, Adjudged and Decreed, that:

"3. The claim of plaintiff against defendants, and each of them, is barred by the provisions of Section 338, subd. 4 of the Code of Civil Procedure of the State of California, and for that reason judgment is hereby given in favor of defendants."

The question for decision therefore is whether items 1 and 2 of the judgment now before us should be stricken.

The answer to this question is not far to seek. While the District Court of Appeal held that the trial of questions of fraud contained no material error, at the same time it determined that the defense of the statute of limitations had not been conclusively tried; that no testimony was introduced relative thereto, and therefore there was no support for the court's finding. Under the directions contained in the remittitur the cause was to be retried on the sole issue of the statute of limitations and if it should be found that the action was barred to enter judgment in favor of defendants. That finding was made and the court concluded that the claim of plaintiff is barred by the provisions of section 338, subd. 4, Code of Civil Procedure, and for that reason judgment was awarded defendants "excepting that plaintiff shall recover his costs in the sum of \$59.15."

But instead of entering judgment barring recovery by plaintiff, it repeated the adjudication contained in the reversed judgment to the effect: (1) that the transfers of property by Herman were fraudulent and void as to the plaintiff and, (2) that the transfer from Herman to the Michel Investment Company was simulated and was not intended to and did not pass the ownership of the property.

[1] The judgment finally entered should have contained but one order, namely, that the claim of plaintiff is barred by the provisions of section 338. The trial court had no discretion as to what the content of the judgment should be, but was obliged to comply with the order reversing the original judgment and to enter judgment for defendants if it should be barred. *Texas Company v. Moynier*, 137 Cal.App. 112, 29 P.2d 873; *English v. Olympic Auditorium, Inc.*, 10 Cal.App.2d 196, 201, 52 P.2d 267; *In re Estate of Dargie*, 48 Cal.App.2d 101, 105, 119 P.2d 438; *Lial v. Superior Court*, 133 Cal.App. 31, 23 P.2d 795.

[2] The attempt by divisions 1 and 2 of the judgment appealed from to decree that the transfers of Herman Michel to the Michel Investment Company were fraudulent and void and that the title of such properties remained in Herman, and that the transfers were simulated have no place in the judgment. When a court has reached the conclusion that the action is barred by the statute of limitations, from that moment plaintiff is without any right of recovery with respect to any demand made by his pleading. A decree that plaintiff's action is barred by the statute of limitations and at the same time determines that the transfers attacked by plaintiff are fraudulent and void is a hybrid that requires prompt extinction. Although it frees the Michel Investment Company from the dstraint of its properties to pay the judgment against Herman Michel, it affirms that because of the fraudulent transfers of the properties they were simulated and the titles thereto remain in Herman Michel. We are directed to no authority for such a judgment. We can find none. There is none. We are required therefore to modify the judgment with respect to the determinations adverse to appellants. *Ryland v. Heney*, 130 Cal. 426, 62 P. 616.

Respondent contends that the directions of the District Court of Appeal have been complied with in that the retrial was solely



upon the issue raised by the plea of the statute of limitations. He supports his contention with the recital that items 3, 4, and 5 of the original conclusions were supplanted with the decision that defendants were entitled to judgment by reason of the bar of the statute. But he ignores the facts that the judgment originally entered was reversed and that the second judgment is now on appeal and not the findings or conclusions made following the first trial. Those findings and conclusions could not now be reviewed. They were embalmed on the former appeal and could guide us now only in the event that the defendants had failed to establish their plea in bar.

Had a successful finding favored plaintiff on the sole issue to be tried, those findings and conclusions would have been re-set in the new judgment roll as decided by the order of reversal. Since that finding was against plaintiff the embalmed decision was *functus officio*. The fact that they are "reflected" in the new judgment is only proof of the error now to be corrected rather than evidence that the second judgment was pursuant to positive orders from the court of appeal. After the reversal of the first judgment, the court started with a clean page. *Cowdery v. London & San Francisco Bank*, 139 Cal. 298, 303, 73 P. 196, 96 Am.St.Rep. 115. The only use to be made of the old judgment was to repeat it in its entirety should the court determine the plea in bar against defendants; otherwise it was *passee*. The order for a retrial upon the single issue of "limitations" could not have intended that those parts of the decree adjudging the transfers fraudulent and simulated should comprise a part of the new judgment in any event. The decision that the action was barred spells *finis* for any recovery by plaintiff.

The authorities cited by respondent in support of his contention (*Robinson v. Muir*, 151 Cal. 118, 90 P. 521; *Argenti v. City of San Francisco*, 30 Cal. 458; *Northern California Power Co. v. Flood*, 186 Cal. 301, 199 P. 315; *Tulare Irr. District v. Lindsay-Strathmore District*, 3 Cal.2d 489, 45 P.2d 972; *Bloom v. Bloom*, 207 Cal. 70, 276 P. 568) are not applicable. In each of them the judgment to be rendered was consistent with the original decree. In the

instant case the judgment to be entered was contrary to every part of the first decree. The trial court, after finding the action barred, was in precisely the same situation in which it would have been had the appellate court made a finding that the action was barred and ordered that judgment be entered in accordance with such finding. The old judgment had been vacated. The new judgment must deny plaintiff any recovery. *Cowdery v. London & San Francisco Bank*, *supra*. No other judgment was possible under the law of the case. *Gallatin v. Corning Irrigation Co.*, 163 Cal. 405, 422, 126 P. 864, Ann.Cas. 1914A, 74; *Newport v. Hatton*, 207 Cal. 515, 519, 279 P. 134; *Tally v. Ganahl*, 151 Cal. 418, 421, 90 P. 1049. Following the decision of the District Court of Appeal that the action was barred if the plaintiff had knowledge of the transfers more than three years before filing suit, the trial court and this court are both bound by that holding as the law of the case.

[3,4] The judgment appealed from awards plaintiff his costs in the sum of \$59.15. There is no authority for such award. The action involved title to real estate. This required that costs be awarded to the prevailing party. Section 1032, Code Civil Procedure. Moreover, since the law of the case made no provision for the award of costs to plaintiff in the event defendants should prevail on the second trial, their recovery on a meritorious defense (*Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 196, 106 P. 715, 21 Ann.Cas. 1279) should entitle them not only to be relieved of the payment of the costs of their adversary but to recover their own costs.

It is, therefore, ordered and adjudged that the judgment be modified by striking therefrom items 1 and 2 and from item 3 the following: "excepting that plaintiff shall recover his costs in the sum of \$59.15." As so modified the judgment is affirmed.

Also, it is ordered that appellants recover their costs of this appeal.

W. J. WOOD and McCOMB, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

59 Cal.App.2d 318

**CRESCENT LUMBER CO., Inc., v.  
BORCHERS et al.**  
Civ. 12354.District Court of Appeal, First District,  
Division 2, California.

June 24, 1943.

**Liens ⇐**

Where lender sent balance of building construction loan to title company with directions to disburse it when report of title free of liens could be furnished, foreclosure of second trust deed extinguished mechanics' liens, and title company paid such balance to one lien claimant, second lien claimant could not recover from title company or first lien claimant on theory of "equitable lien", or "unjust enrichment," or any other theory.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Lien" and "Unjust Enrichment".

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Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Suit by the Crescent Lumber Company, Inc., against R. H. Borchers and others, doing business under the firm name and style of Borchers Bros., a copartnership, and another, to enforce an alleged equitable lien. From a judgment for plaintiff, defendants appeal.

Reversed with directions.

Frank V. Campbell, Robert E. Hayes, and Frank L. Custer, all of San Jose, for appellants.

Elmer D. Jensen and Robert E. Cassin, both of San Jose, for respondent.

SPENCE, Justice.

Plaintiff filed a complaint entitled "Complaint to Enforce Equitable Lien", naming as defendants Borchers Bros., a copartnership, the members thereof and the San Jose Abstract and Title Company, hereinafter called the title company. Plaintiff prayed that Borchers Bros. be compelled to pay into court the sum of \$402.40; that an equitable lien be declared thereon in favor of mechanic's lien claimants; and that a pro-rata participation therein by the mechanic's lien claimants be ordered. The cause was tried upon an agreed statement of facts, which was incorporated into the

trial court's findings of fact and conclusions of law. The trial court entered an ordinary money judgment in favor of plaintiff and against defendants in the sum of \$144.20. Defendants appeal from said judgment upon the judgment roll.

Plaintiff's complaint and the trial court's judgment were based upon the theory that plaintiff had an "equitable lien" under the authority of *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898. We are of the view, however, that the agreed statement of facts presents an entirely different situation from that presented in the cited case. The *Smith* case involved a controversy between the administratrix of the estate of the deceased owner of real property and certain mechanic's lien claimants, whose mechanic's liens had been wiped out by the foreclosure of a second deed of trust, over the unexpended balance of a construction loan, secured by a first deed of trust, which unexpended remained in the hands of the lender. The court there stated, on page 501, 271 P. 898, that it had found no authority directly in point governing the rights of the respective parties. On page 502 of 205 Cal., 271 P. 898, it held that the terms of the construction loan agreement gave rise to no trust, express or implied, in favor of the lien claimants, but it pointed to the special circumstances present and said, at page 504 of 205 Cal., at page 901 of 271 P.: "*Smith* and the securities company by their conduct may be said to have induced, or contributed to induce, the lien claimants to enhance the value of the real property by their labors and materials, and it would be inequitable and unjust, it seems to us, to permit *Smith* or his personal representative to withhold, at this time, any part of the fund upon which the lien claimants must surely have relied for reimbursement." It was therefore held, upon the theory of "equitable estoppel" (page 504 of 205 Cal., page 902 of 271 P.), that there were "special circumstances warranting the imposition in their (the lien claimants') favor of a charge or lien upon the fund" (page 502 of 205 Cal., page 901 of 271 P.) and that the trial court should have directed the securities company to pay into court the unexpended balance of the construction loan fund to be thereafter disbursed pro rata among the lien claimants. Page 504 of 205 Cal., 271 P. 898.

In the present case the unexpended balance in the construction loan fund at the

time the building was completed was \$402.40. At about the time of the foreclosure of the second deed of trust, the lender of the construction loan sent the balance of \$402.40 to the defendant title company with the authorization "to disburse these funds when you can furnish us with a report showing title free and clear of all liens". It was stipulated that the liens of the mechanic's lien claimants had been "wiped out" by the foreclosure of the second deed of trust. Shortly thereafter and on August 21, 1940, the title company disbursed the entire balance of \$402.40 to Borchers Bros., one of the mechanic's lien claimants, in partial payment of its claim of \$489.93. The validity of said claim is not questioned. Borchers Bros. gave the title company an indemnity agreement with respect to the payment of said balance. Subsequently plaintiff herein first advised the title company that plaintiff claimed "an equitable lien upon the funds remaining in that certain building and loan account held by" the title company. But at that time there were no "funds remaining" in said account, said funds having been previously expended in their entirety.

It is thus apparent that this is not a controversy between the owner of property and mechanic's lien claimants over an existing balance of a construction loan fund remaining in the hands of the lender. It is essentially a controversy between two mechanics' lien claimants, after the expenditure of the entire construction loan fund, in which one claimant seeks to recover from another a portion of the amount which had been previously expended from the fund in payment of a portion of the claim of the latter. We know of no theory, legal or equitable, upon which such recovery may be predicated. Plaintiff advances no legal theory but relies upon the equitable lien theory enunciated in *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898. From what has already been said, it is apparent that the facts in that case are clearly distinguishable. Furthermore, as pointed out in a more recent case, the *Smith* case and similar cases are based upon the proposition that an equitable lien should be imposed under certain circumstances to prevent "unjust enrichment" of one of the parties to the litigation; and it is said that when there is no unjust enrichment, "The rule as to equitable liens should not be enlarged and extended \* \* \*". *Mortgage Guar. Co. v. Hammond*

*Lumber Co.*, 13 Cal.App.2d 538, 544, 57 P.2d 164, 167. There is no element of unjust enrichment appearing here and there is no existing balance in any unexpended fund upon which equity may impose a lien. The trial court, in attempting to apply the equitable lien theory of the *Smith* case, entered an ordinary money judgment against all defendants, including the title company, but we find no theory under the agreed facts upon which plaintiff could be entitled to any relief against any of the defendants. We therefore conclude that the judgment against defendants should be reversed with directions.

The judgment is reversed with directions to the trial court to enter judgment in favor of the defendants.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.



59 Cal.App.2d 172

**PEOPLE v. KERSTEN.**

Cr. 3677.

District Court of Appeal, Second District,  
Division 3, California.

June 11, 1943.

Hearing Denied July 8, 1943.

**1. Criminal law** ⇨993

Where trial court, in determining degree of crime of burglary to which defendant pleaded guilty and in imposing sentence, stated that the degree of the offense was burglary of the second degree, but did not finish the pronouncement of judgment, granted a continuance, no minute entry was made concerning the degree of the crime, and no legal restraint was imposed on defendant, trial court did not err in subsequently changing its previous statement and imposing a sentence for first-degree burglary.

**2. Criminal law** ⇨996(2)

If sentence imposed has been entered in the minutes of the court, or if defendant has begun serving such sentence or has been restrained by the sentence imposed, the court is without jurisdiction to



vacate, add to, or modify the sentence originally pronounced.

### 3. Criminal law §993

If sentence pronounced has not been entered by the clerk in his minutes and no legal restraint has been imposed upon defendant by reason of the sentence, the court may properly change the sentence originally pronounced.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Hubert R. Kersten pleaded guilty to a charge of burglary, and, from a determination of the trial court that the degree of the offense was first-degree burglary, the defendant appeals.

Affirmed.

Morris Levine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant pleaded guilty to a charge of burglary. The court determined the crime was burglary of the first degree, and sentenced the defendant to imprisonment in the penitentiary. Defendant states that his appeal from the judgment is to modify the judgment to conform with a finding by the court that the crime was burglary of the second degree.

On April 3, 1941, defendant pleaded guilty and admitted the four prior convictions of felonies alleged in the amended information. Pronouncement of judgment was continued from time to time, at defendant's request, in order that defendant might proceed further with the development of his alleged invention of an airplane propeller hub, which he claimed would be of great value to the government.

On January 15, 1942, when the case was on the calendar for judgment, after six continuances, it was stipulated (although defendant had admitted the prior convictions on April 3, 1941) that the court "might determine the allegations of the four prior convictions" from the probation officer's report. The court found those allegations to be true. Thereupon the court announced in chronological order the proceedings that had occurred in the

case up to and including a part of the arraignment upon the amended information, and then stated: "It was stipulated that the court was to determine the degree of the offense from the report of the probation officer. The court now determines it to be burglary of the second degree." Then the court completed its review of the prior proceedings, and asked: "Is there any legal cause why judgment should not be pronounced?" Counsel for defendant, after replying in the negative, made a statement concerning the defendant's efforts to complete the invention, and asked for another continuance. The court did not finish the pronouncement of judgment, and granted a continuance to April 2, 1942. No minute entry was made concerning the degree of the crime. On April 2nd, the defendant was not present and an order was made that the undertaking of bail was forfeited.

On July 9, 1942, the defendant was brought into court, and preliminarily to pronouncement of judgment, the court stated: "Pursuant to the stipulation heretofore entered into the court fixes the degree of the offense as burglary in the first degree." In pronouncing judgment the court said: "It is the judgment and sentence of this court \* \* \* that for the offense of burglary, which the court has fixed as burglary in the first degree \* \* \* that you be sentenced \* \* \*." At that time, July 9th, it was not called to the court's attention that the court had stated on January 15th or at all that the crime was burglary of the second degree. A minute entry was made on July 9, 1942, that: "The court finds the crime to be burglary of the first degree \* \* \*." A judgment was thereupon entered which included a recital, as follows: "Whereas the said \* \* \* pleaded guilty \* \* \* of burglary \* \* \* which the court found to be burglary of the first degree \* \* \*."

[1] Defendant asserts that the statement by the trial court on January 15, 1942, that the degree of the crime was burglary of the second degree was "the same as the finding of a jury"; that it was the law of the case; that the fact so stated was res judicata; and that the court "erred in raising the degree of the offense after it had fixed it as a lower degree." He cites the case of *People v. Cowan*, 1941, 44 Cal. App.2d 155, 162, 112 P.2d 62. In that case the sentences pronounced as to two defendants were to run concurrently with

previous sentences the defendants were then serving. After the judgments were modified on appeal by a determination that the crimes were of the second degree, the trial court ordered that the sentences run consecutively. On appeal from that order it was held that the trial court was not empowered to add anything to a judgment which had been approved. It thus appears that a material difference between the cited case and the present one is that the judgment had been entered in the cited case, and that the pronouncement of judgment in the present case had not been completed, and was not completed thereafter, on the occasion when the court stated the crime was burglary of the second degree. When the proceedings of that occasion were interrupted by defendant's motion for a continuance and the continuance of approximately 2½ months was granted, the defendant was under no legal restraint by reason of said statement, and apparently the court, district attorney, counsel for defendant, and the clerk regarded the proceedings of that occasion, except the continuance, as ineffectual; and apparently for that reason no minute entry was made of the statement by the court that the crime was second degree burglary. One of the reasons for concluding that counsel for defendant apparently so regarded the proceedings is that counsel did not call the court's attention to the previous statement relative to second degree burglary when the defendant was sentenced on July 9th.

[2,3] As above stated, there was neither a minute entry nor a judgment embodying the statement of the court relative to second degree burglary. The trial court did not err in changing its previous statement that the crime was second degree burglary. The case of *People v. McAllister*, 1940, 15 Cal.2d 519, 102 P.2d 1072, related to the power of the trial court to modify its sentence, and cited several cases concerning that subject. The court stated, 15 Cal.2d on page 526, 102 P.2d on page 1075: "From the foregoing cases we think the following rule has been established: If the sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal

restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced."

The judgment is affirmed.

SHINN, Acting P. J., and SHAW, Justice pro tem, concur.



59 Cal.App.2d 285

**PEOPLE v. HARTSHORN.**

Cr. 2253.

District Court of Appeal, First District,  
Division 2, California.

June 21, 1943.

Rehearing Denied July 6, 1943.

Hearing Denied July 19, 1943.

**1. Criminal law** ⇨1023(9)

Where no sentence was imposed on verdict there was no "judgment" from which to appeal and attempted appeal from judgment of conviction was dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

**2. Criminal law** ⇨878(4)

Conviction on count charging assault with intent to commit rape was not void as inconsistent with acquittal on other counts charging lewd and lascivious conduct on body of child and conduct tending to cause minor to lead lewd or immoral life. Pen.Code, §§ 220, 288, 954; St. 1937, p. 1033, § 702.

**3. Criminal law** ⇨878(3)

Under statute each count in information which charges a separate and distinct offense must stand on its own merits, and verdict of either conviction or acquittal on one count has no effect or bearing on other separate counts. Pen. Code, § 954.

**4. Criminal law** ⇨1172(2)

Instruction that defendant was "necessarily" charged with violating section of Penal Code relating to lewd and lascivious conduct on body of child, but that the court ruled as matter of law that there was no evidence to sustain conviction on that

charge, was not prejudicial to defendant for use of the quoted word, where evidence would have warranted conviction on that charge. Pen. Code, § 288.

##### 5. Infants 20

In order to convict a defendant of violating provision of Penal Code relating to lewd and lascivious conduct on body of a child, it would not be necessary to prove that the defendant laid hands on any particular part of the body of the child. Pen. Code, § 288.

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Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Clyde Hartshorn was convicted of assault with intent to commit rape, and from order denying motion for new trial, defendant appeals, and he attempts to appeal from judgment of conviction.

Attempted appeal from judgment dismissed and order denying motion for new trial affirmed.

George L. Lang and Charles Douglas, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried by a jury upon an information framed in three separate counts charging a violation of sections 220 and 288 of the Penal Code, and section 702 of the Welfare and Institutions Code, St. 1937, p. 1033. He was convicted on count one, acquitted on count three, and acquitted under special instructions on count two. A motion for probation was granted on condition that he serve six months in the county jail and pay a fine of \$250. He appeals from the judgment and the order denying his motion for a new trial.

[1] As no sentence was imposed upon the verdict there is no judgment to appeal from, and hence the attempted appeal from the judgment must be dismissed. In re Phillips, 17 Cal.2d 55, 58, 109 P.2d 344, 132 A.L.R. 644; People v. Guerrero, 22 Cal.2d 183, 137 P.2d 21.

Treating the arguments made in appellant's brief as addressed to the appeal from the order denying a new trial, we find two points raised—that the acquittal upon counts two and three is inconsistent with

the verdict of conviction on count one, and hence the latter is void; that the trial court committed error in the course of the instruction relating to count two.

The facts as testified to by the prosecutrix and other witnesses are: Defendant and his wife left their house early in the evening to attend a party and engaged the prosecutrix, a girl of 13 years, to stay with their two infant children. Defendant left his wife at the party and returned to his home at about 4 A. M. He entered the bedroom where the prosecutrix was sleeping with the two children, removed his clothes, and got into bed with her. He removed some of her clothing and endeavored to quiet her by placing his hand upon her throat. The screams of the girl attracted the attention of neighbors, whose bedroom windows overlooked, and were in close proximity to, the room in which the defendant and the girl were struggling. One of these neighbors rapped on the window pane; called to the defendant to desist, and then summoned the police. The defendant then put in his own call for the police; donned his clothes and was at his doorstep to greet the officers when they arrived. This testimony was met by direct denials of the defendant, but the jury was privileged to accept the story of the prosecutrix and no contention is now made that the evidence was insufficient to support the verdict on count one.

[2,3] The argument that the verdict is inconsistent is not sound. Count one charging a violation of section 220 of the Penal Code relates to an assault with intent to commit rape. Count two covering section 288 relates to lewd and lascivious conduct upon the body of a child. Count three, covering section 702 of the Welfare and Institutions Code, relates to conduct tending to cause a minor to lead an idle, dissolute, lewd or immoral life. It is, of course, conceivable that an assault with intent to commit rape might be completed without any actual contact with the body of the girl, and without any of the other acts denounced in the two other statutes. Section 954 of the Penal Code permits the joinder in separate counts of charges of two or more "different offenses" connected in their commission, and of two or more "different offenses" of the same class. In 1927 there was added to the section the proviso that "a verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other



count." It would have been difficult to find plainer language, but cases have been cited which discuss at length the effect of an acquittal when the two verdicts are "inconsistent." However, since this amendment *People v. Ranney*, 123 Cal.App. 403, 407, 11 P. 2d 405; *People v. Derenzo*, 46 Cal.App.2d 411, 415, 115 P.2d 858; *People v. Amick*, 20 Cal.2d 247, 251, 125 P.2d 25; *People v. Kearney*, 20 Cal.2d 435, 439, 126 P.2d 612; and *People v. Guerrero*, 22 A.C. 181, 188, have all followed the clear intent of the amendment and have refused to follow the earlier cases to the contrary. The clearest statement of the reason for the courts to adhere to the terms of the amendment is found in *People v. Ranney*, supra [123 Cal.App. 403, 11 P.2d 406], where Justice Thompson stated: "This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein. \* \* \* There are no authorities to the contrary in other jurisdictions where a statute exists similar to the California law above quoted."

[4, 5] The second ground urged for a reversal has less merit. In advising the jury that it should acquit appellant on the second count because the evidence was insufficient the trial court inadvertently used the word "necessarily" so that the instruction read in part: "Now, the defendant is necessarily charged with a violation of Section 288 of the Penal Code, but, ladies and gentlemen, with reference to that, I have ruled as a matter of law that no evidence has been introduced in the case tending to prove the commission of any acts which would tend to constitute a violation of Section 288 of the Penal Code." This was followed immediately with the statement reading: "\* \* \* but I do not wish you to assume that I either directly or indirectly state or infer that you should find the defendant guilty of either of the two remaining counts in the complaint. \* \* \*" We do not know what the trial judge meant in the use of the word "necessarily." It is probable that he intended to say "usually" or "ordinarily" because we know from the many cases of this character appearing in the reports that a defendant is usually charged under section 288 in a count separate from the charge of the

greater offense. We do know, however, that if any error was committed in this instruction it was prejudicial to the State, and not to the appellant, because the evidence would have warranted a conviction upon that count. The trial court seems to have taken the view that it was necessary to prove that appellant laid hands upon a particular part of the body of the girl, but the code section does not justify that interpretation. This is the rule of *People v. Lanham*, 137 Cal.App. 737, 740, 31 P.2d 410; and we have found no authority to the contrary.

The appeal from the judgment is dismissed. The order denying the motion for a new trial is affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concur.



59 Cal.App.2d 369

# PEOPLE v. HOWERTON.

Cr. 3710.

District Court of Appeal, Second District,  
Division 2, California.

June 25, 1943.

## Criminal law ☞ 1186(4)

Where defendant admitted his guilt in open court, there was no "miscarriage of justice" authorizing a reversal of his conviction. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Robert Lester Howerton was convicted of committing lascivious act upon the body of a child. From a conviction and an order denying motion for new trial, he appeals.

Judgment and order affirmed.

William G. Kenney, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was found guilty by a jury of the violation of section 288 of the Penal Code. It was specifically charged in the information that he committed lascivious acts upon the body of a boy of the age of six years in a theatre in the city of Los Angeles. On this appeal from the judgment of conviction and from the order denying his motion for a new trial defendant contends that the evidence is insufficient to support the conviction and that the court erred in denying a new trial.

The trial court permitted defendant to file an application for probation. The record discloses that when the court considered the report of the probation officer the following proceedings took place:

"The Court: What is that Medical Lake institution at Washington, Mr. Howerton? That is an insane asylum, isn't it?"

"The Defendant: No, sir, it is more of a hospital.

"Q. More of a hospital, a hospital for mental cases, isn't it? A. I believe that it is for kids and children.

"Q. You mean that it is not an asylum? A. It is for children and kids and people in my condition.

"Q. You were in Medical Lake, Washington, at one time? A. Yes.

"Q. How long were you in the school hospital, or whatever you choose to call it, there? A. Eight years.

"Q. How did you happen to be committed to that place? A. For the same charge.

"Q. What do you mean by the same charge? A. Well, I got in trouble with another little boy.

"Q. In trouble with a little boy? A. Yes.

"Q. The thing that you did to that little boy was different than what you did to the little boy involved in this case, wasn't it. A. Yes, Your Honor.

"Q. You committed sodomy with him, didn't you? A. Yes.

"Q. How old were you then? A. About sixteen.

"Q. How old are you now? A. Twenty-seven.

"Q. What did you do to this little boy in the theatre out there on the day in question? A. I played with his front privates.

"Q. How? A. I was playing with his front privates.

"Q. What is the matter with you? Why do you do those things? A. I don't know. It is just a desire, I guess."

It appears from the foregoing that defendant has admitted his guilt in open court. We are prohibited by the Constitution of California, Article VI, section 4½, from setting aside a judgment or granting a new trial unless in our opinion errors of the trial court resulted in a miscarriage of justice. It is apparent that there has been no miscarriage of justice in the present case.

The judgment and the order are affirmed.

MOORE, P. J., and McCOMB, J., concur.



59 Cal.App.2d 309

GOODERHAM & WORTS, LIMITED, v.  
COLLINS et al.  
CIV. 12402.

District Court of Appeal, First District,  
Division 1, California.

June 24, 1943.

#### 1. Intoxicating Liquors § 90(1)

Where orders for liquor were accepted and the liquor was delivered within the state to foreign corporations not qualified to do business and not holding liquor licenses under the laws of the state for resale outside the state, the sales were made within the state and were subject to state excise taxes. St.1935, pp. 1123, 1124, 1126, 1128, §§ 5, 6(d, f); p. 1132, §§ 2(l), 24; p. 1135, § 30.

#### 2. Intoxicating Liquors § 90(1)

A state may collect a tax on unlawful sales of liquors as well as on lawful sales. St.1935, pp. 1123, 1124, 1126, 1128, §§ 5, 6(d, f); p. 1132, § 2(l); p. 1135, § 30.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Gooderham & Worts, Limited, against Richard E. Collins, Chairman, George R. Reilly, Fred E. Stewart, Wm. G. Bonelli and Harry B. Riley, State Controller, as members of the State Board of Equalization of the State of California Charles G. Johnson, as treasurer of the State of California, and the State Board of Control of the State of California, to recover the sum of \$1075.30 theretofore paid under protest to the state as excise taxes on 19 separate sales of alcoholic beverages. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Richard S. Goldman, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson, Dep. Atty. Gen., for respondents.

KNIGHT, Justice.

The plaintiff, Gooderham & Worts, Ltd., appeals from a judgment for defendants in an action to recover the sum of \$1,075.30 theretofore paid under protest to the state as excise taxes on nineteen separate sales of alcoholic beverages.

The sales were made by plaintiff during the years 1936 and 1937; and the taxes were collected by the State Board of Equalization under the authority of the 1935 Alcoholic Beverage Control Act, Stats. 1935, p. 1123. Section 24 of the act provided: "An excise tax is hereby imposed upon all distilled spirits sold in this State \* \* \*"; and section 2(l) declared that the words "sell" and "sale" and the phrase "to sell" as used in the act "means and includes any of the following: to exchange, barter, traffic in; to solicit or receive an order for; \* \* \* to traffic in or deliver for value or in any way other than gratuitously; to possess with intent to sell"; but that the "transfer of title to alcoholic beverages unaccompanied by a transfer of possession of such beverages shall not be deemed a sale of such beverages." The plaintiff is a Delaware corporation, qualified to do business in California, and at the time these transactions took place operated a place of business in Los Angeles where it kept, offered for sale and sold a stock of distilled liquors. Its business was carried on under two separate licenses issued by the state of California pursuant to section 5 of said act, to-wit, an "importer's license," and a "wholesaler's

license." Section 6(d) of the act provided that "Any importer's license authorizes the person to whom issued \* \* \* to export such alcoholic beverage"; and section 6(f) provided that "Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage." The sales in question were made to Nevada Wholesale Liquor Company, a Nevada corporation, and Central Distributing Company, an Arizona corporation. Each was licensed by the state of its domicile as a wholesale distributor of liquor in that state, but neither was qualified to do business in California, nor did either hold any sort of a liquor license under the laws of this state. The liquor was purchased for resale in those states, but the orders called for "delivery F. O. B." at plaintiff's warehouse in Los Angeles. The orders were solicited by plaintiff's salesmen in Nevada and Arizona, and by them mailed to or delivered at plaintiff's Los Angeles place of business; whereupon plaintiff filled the orders from its stock at its warehouse in Los Angeles, and delivered the liquor at the warehouse to the purchasers' employees, who placed it upon trucks owned and operated by the purchasers and driven by the purchasers' employees. The liquor was then transported by the purchasers' employees on said trucks out of the state; and no part thereof was resold or used in California.

The trial court found that the sales "were made, completed and consummated wholly within the state of California," and that the liquor was "delivered by plaintiff to the purchaser or to the purchaser's employees within the state of California"; and as conclusion of law the court held that since plaintiff sold the liquor to unlicensed persons within the state of California the sales were unlawful and the liquor was subject to seizure and forfeiture; that such being the case, plaintiff was not entitled to a refund of any of the taxes paid on those sales.

Plaintiff's main contention is that the transactions in question did not constitute sales within the state; that they involved only the exportation of the liquor without the state, which plaintiff was entitled to carry on under its importer's license, and that therefore the taxes were imposed in contravention of the commerce clause of the federal Constitution and of section



30 of the California Alcoholic Beverage Control Act.

[1] The arguments advanced by plaintiff in support of its contentions are fully negatived by a group of cases decided by this court subsequent to the taking of the present appeal. The first of those cases, *Gooderham & Worts, Ltd., v. Collins*, 50 Cal.App.2d 716, 123 P.2d 922, involved the sale of a quantity of liquor by plaintiff to the Matson Navigation Company to be resold by the latter company to passengers aboard its ship after the ship reached the high seas and was beyond the territorial limits of the United States. At the time of the sale the Matson company was the holder under the state act of an "importer's license"; also "retailer's licenses" for specific boats. The liquor was manufactured in Canada, and shipped to San Francisco by rail in a pooled, bonded car, and there released by plaintiff to the Matson company's custom brokers, placed on the Matson company's bonded trucks and transported to and placed aboard the Matson company's ship, docked in San Francisco; and the liquor bore no stamps making it lawful to open the same within the territorial limits of this state. It was held that since there was an actual delivery of the liquor by the seller to the purchaser in San Francisco and the liquor thereafter remained in the absolute possession of the purchaser and under its complete control and dominion, the transaction constituted a sale "within the state," and was therefore taxable, even though the liquor was not to be opened, resold or used until it was beyond the bonds of the state. The decision in that case was expressly followed in *Rathjen Bros. v. Collins*, Civ.No. 11911, 50 Cal.App.2d 765, 123 P.2d 925, and *Tonkin Distributing Co. v. Collins*, 50 Cal. App.2d 790, 123 P.2d 938, wherein similar facts were involved. Those three cases are determinative of the issue here presented.

The fact that the liquor was sold to non-licensed, out-of-state purchasers did not operate to exempt the transactions from taxation, for such were the facts involved in the *Rathjen* and *Tonkin* cases, and it was there held that if the control of the liquor passes to the purchaser or his agent in California the transaction is taxable.

In other words, it is held that the determining factor is whether the liquor is delivered to the purchaser or his agent within the state. If it is, the transaction is taxable, regardless of the residential status of the purchaser.

Plaintiff places much reliance on the case of *People v. Tux Winery Co.*, 20 Cal. App.2d 700, 67 P.2d 752; but there is nothing said therein which conflicts with the decisions in any of the cases above cited, and the factual situation therein was entirely different from the one here presented. There the sales transaction took place between two licensed wholesalers doing business in this state, and it was held that the tax was not collectible prior to a sale of the liquor to the retailer.

[2] As already pointed out, under the recent decisions above cited, the transactions herein were taken out of the classification of exportation because of the delivery of the liquor in California, and under the "wholesaler's license" issued to plaintiff it was authorized to sell the alcoholic beverages specified in the license "only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverages." Since, therefore, the purchasers herein were not licensed in this state, the trial court was warranted in holding that the sales were unlawful. But the determination of the present appeal in no way depends upon the question of whether the sales were lawful or unlawful, for it is well settled that "\* \* \* the state may collect the tax on sales which are unlawful—i. e., made to non-licensees, as well as on lawful sales made to licensees." *Rathjen Bros. v. Collins*, Civ.No.11911, 50 Cal.App.2d 765, 123 P.2d 925, 929. The same rule is declared again in the companion case of *Rathjen Bros. v. Collins*, 50 Cal.App.2d 774, 123 P.2d 930, 932, wherein the court said: "As was held in the *Empire Vintage Co.* case, supra, [*Empire Vintage Co. v. Collins*, 40 Cal.App.2d 612, 105 P.2d 391] and reaffirmed in Civ. 11911, supra, [*Rathjen Bros. v. Collins*, 50 Cal.App.2d 765, 123 P.2d 925] the tax was due on all nonexempt sales, and that applies to illegal as well as to legal sales."

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

59 Cal.App.2d 417

**PEOPLE v. GOMEZ.**

Cr. 3714.

District Court of Appeal, Second District,  
Division 2, California.

June 26, 1943.

**1. Automobiles ☞344**

The phrase, "with reckless disregard of the safety of others", as used in negligent homicide section of Vehicle Code, means intentional doing of act with wanton and reckless disregard of possible result. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Disregard of Safety of Others".

**2. Automobiles ☞344**

The phrase, "with willful indifference to the safety of others", as used in negligent homicide section of Vehicle Code, means intentional lack of regard concerning others' safety or intentional doing of something with knowledge that serious injury will probably result. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Indifference to Safety of Others".

**3. Automobiles ☞344**

Criminal law ☞1159(2)

Whether a defendant is guilty of negligent homicide within meaning of Vehicle Code depends on circumstances of particular case, and finding of trier of facts, supported by substantial evidence, will not be disturbed by appellate court. Vehicle Code, § 500, St.1941, p. 1414.

**4. Automobiles ☞355(13)**

Evidence held sufficient to sustain trial court's finding of defendant's guilt of negligent homicide within meaning of Vehicle Code. Vehicle Code, § 500, St.1941, p. 1414.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Lauro Gomez was convicted of negligent homicide, and he appeals.

Affirmed.

Keith R. Jensen, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty on two counts of negligent homicide (section 500 of the Vehicle Code, St.1941, p. 1414) after trial before the court without a jury, defendant appeals. There are also appeals from the orders denying his motions for a new trial.

The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in *People v. Pianezzi*, 42 Cal.App.2d 270, 277, 108 P.2d 685, the essential facts are:

About midnight of December 14, 1942, defendant was driving an automobile at approximately 40 miles per hour in a northerly direction on Mission Road in Los Angeles. Riding in the automobile with him were four other persons including Mr. Refugio Salazar. When defendant arrived at the intersection of Mission Road and Sichel Street he observed an automobile which was being driven by Mr. Alfieri, and in which Mrs. Alfieri was also riding, traveling in a southerly direction on Mission Road about half a block north of the intersection just mentioned. At this time a third car was traveling in a northerly direction on Mission Road approximately 100 feet in front of the automobile which defendant was driving. The last-mentioned car passed the automobile in which Mr. and Mrs. Alfieri were riding. After which, and when about 15 feet from the Alfieris' automobile, defendant without warning drove his automobile across the center line of Mission Road on to the west half of the thoroughfare causing a head-on collision between the car he was driving and the automobile operated by Mr. Alfieri. When the accident occurred Mr. Alfieri was driving between 25 and 30 miles per hour. At the point of the accident (approximately half-way between two intersecting cross streets) Mission Road was 54 feet from curb to curb. Defendant admitted that prior to the collision he had consumed four glasses of beer. Both Mr. Salazar and Mrs. Alfieri received injuries in the accident from which they died.

Defendant relies for reversal of the judgments on this proposition:

*There is not any substantial evidence to sustain the trial court's finding that decedents died as the proximate result of in-*

*juries caused by defendant's driving an automobile "with reckless disregard of, or wilful indifference to, the safety of others".*

[1] This proposition is untenable and is governed by the following pertinent rules:

1) The phrase "with reckless disregard of \* \* \* the safety of others" as used in section 500 of the Vehicle Code means the intentional doing of an act with wanton and reckless disregard of the possible result. (People v. Young, 20 Cal.2d 832, 837, 129 P.2d 353.)

[2] 2) The phrase "with \* \* \* wilful indifference to, the safety of others" as used in section 500 of the Vehicle Code means the intentional lack of regard concerning the safety of others or intentionally doing something with knowledge that serious injury will probably result. (People v. Young, supra.)

[3] 3) Whether a defendant is guilty of negligent homicide within the meaning of section 500 of the Vehicle Code depends upon the circumstances of each case, and a finding of the trier of facts when supported by substantial evidence, will not be disturbed by an appellate court. (See People v. Murray, 58 Cal.App.2d 239, 136 P.2d 389.)

[4] Applying the foregoing rules to the facts in the instant case we are of the opinion that there is substantial evidence to sustain the trial court's finding that defendant violated section 500 of the Vehicle Code. The evidence discloses that defendant after having partaken of an intoxicating beverage drove an automobile at 40 miles per hour on a public highway; that he observed another automobile (Mr. Alfieri's) approaching him on the same highway approximately a half block distant; that thereafter defendant continued to operate his automobile without diminishing its speed until within approximately 15 feet of the automobile he was approaching, at which time he suddenly, without notice, swerved to the wrong side of the street and drove his car directly into the

path of the approaching automobile, and that as a result of the ensuing accident two persons died. Certainly such conduct sustains the implied findings of the trial court that defendant a) intentionally did an act with wanton and reckless disregard of the possible results, and b) intentionally did an act with knowledge that serious injuries would probably result.

People v. Young, supra, and People v. Montes, 56 Cal.App.2d 30, 131 P.2d 581, relied on by defendant are factually distinguishable from the instant case.

In People v. Young, supra, the Supreme Court points out that it was not a case in which defendant had an opportunity to see the deceased for some distance prior to the accident and then continued a course of conduct which resulted in injury and death. Indicating that thus there was no element of intent to cause injury or a high degree of probability that injury would result. In the present case, however, defendant by his own admission saw the automobile of the Alfieri's a half block before the accident occurred and then deliberately followed a course of conduct which was highly probable to result in serious injury and death.

In People v. Montes, supra, defendant drove his automobile into an intersection without making a boulevard stop, and he also failed to yield the right of way to a car approaching from his right. A collision ensued resulting in the death of an occupant of one of the cars. In the Montes case it was expressly found that the defendant was not driving at an excessive speed as he approached the intersection and that he was guilty of nothing more than simple negligence. In the instant case the evidence supports the implied finding that defendant's conduct did not constitute merely simple negligence but evidenced a reckless disregard of, and wilful indifference to the safety of others.

For the foregoing reasons the judgments and orders are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



**HANNAH v. POGUE.****POGUE et al. v. HANNAH et al.****HANNAH v. POGUE et al. (two cases).\***

Civ. 3062.

District Court of Appeal, Fourth District,  
California.

June 14, 1943.

Rehearing Denied July 13, 1943.

Hearing Granted Aug. 12, 1943.

**1. Waters and water courses**  $\S$ 247(2)

Where vendor and purchaser of dominant tenement admitted that for more than 20 years a dam had been maintained on the servient tenement to divert water from a river into an irrigation ditch and that described rights of way had been used to maintain dam, vendor was a "necessary party" to suit by owner of servient tenement against purchaser to restrain the maintenance of a dam, except in a described location.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

**2. Easements**  $\S$ 70

Where defendants' proof of damages from obstruction of road on servient tenement which right of way easement was secondary to easement to maintain a dam to divert water from a river into an irrigation ditch, was speculative, confusing, and uncertain, trial court's failure to find monetary damages was not error.

**3. Waters and water courses**  $\S$ 243

Evidence established that owners of dominant tenement were entitled to a right of way easement for road purposes across servient tenement as a "secondary easement" to easement to maintain a dam to divert water from a river into an irrigation ditch.

See Words and Phrases, Permanent Edition, for all other definitions of "Secondary Easement".

**4. Boundaries**  $\S$ 37(3)

Evidence established that portions of agreed boundary fence had been replaced at their former locations after they had washed out, authorizing finding in favor of an agreed boundary line.

**5. Boundaries**  $\S$ 37(5)

Evidence established that plaintiff's and defendants' predecessors had agreed upon location of the boundary line between the

\* Subsequent opinion 147 P.2d 572.

properties authorizing a finding in favor of the agreed boundary.

**6. Boundaries**  $\S$ 37(5), 46(1)

An agreement fixing a boundary line need not be established by direct evidence but may be inferred by conduct and especially by long acquiescence, and the agreement must be express or implied from the acts of the parties and acquiesced in for the period fixed by the limitation statute.

**7. Boundaries**  $\S$ 33

A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both of the adjoining owners has definitely fixed such line by erecting a fence or other monument on it and both have treated the fence or monument as fixing the boundary between them for such length of time that neither ought to be denied the correctness of its location.

**8. Appeal and error**  $\S$ 842(7)

Whether other testimony of the parties overcomes a justifiable inference from long acquiescence that an agreement was formerly made as to location of a boundary line involves the weighing of conflicting evidence, a function exclusively of the trial court, and is not a "question of law", within the province of a reviewing court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

**9. Appeal and error**  $\S$ 842(7)

Where there was no clear and satisfactory showing that the boundary line between plaintiff and defendants' property was different from that indicated by a fence, whether other testimony overcame inference from long acquiescence that an agreement was formerly made as to location of the boundary line was a function exclusively of the trial court, and was not a "question of law" within the province of the District Court of Appeal.

**10. Boundaries**  $\S$ 43

Where boundary line established in decree, when considered with attached plat and lines established by the parties was not so uncertain as to description that line could not be located, decree was proper.

**11. Boundaries**  $\S$ 43

In action to determine a boundary line, decree quieting title to the property of both

parties in respect to the fixed line, was proper.

**12. Equity** ⇨39(1)

In equity suits in which all the parties are before the court, court must finally determine the respective rights of the parties to land and dispose of all issues presented by the pleadings.

**13. Waters and water courses** ⇨243

Where stream in which defendants maintained a dam on servient tenement to divert water into an irrigation ditch had been obstructed by deposits from natural causes in its bed preventing the flow of water to defendants' ditch, the duty of making repairs devolved solely upon defendants, and defendants in a reasonable manner, without damage to the owner of the servient tenement, were entitled to make such an alignment of the stream and perform such acts as were essential to their enjoyment of the water.

**14. Easements** ⇨42

Where use of a thing is granted, everything is granted essential to such use, and such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement.

**15. Easements** ⇨54

Changes in the character of an easement are forbidden and any material increase in the burden thereof upon the servient estate is prohibited.

**16. Easements** ⇨54

Only those alterations in the mode of enjoyment of an easement are prohibited which impose an increased restriction upon the right of the owner of the servient tenement to the enjoyment of his property.

**17. Easements** ⇨42, 54

A grant of an easement carries with it certain secondary easements essential to its enjoyment such as the right to make repairs, renewals, and replacements, and an insubstantial change in location of the means of diversion will not destroy an easement to divert water for irrigation purposes.

**18. Waters and water courses** ⇨243

Where defendants were entitled to maintain on servient tenement a dam to divert water from a river into an irrigation ditch, defendants were entitled to maintain a dam wholly within the river bed to enjoy their easements so as not needlessly to increase the burden upon the servient tene-

ment, and to make such repairs, renewals, and replacements to the dam as might be required by changes in width and course of the channel without being tied down by permanent restriction.

**19. Waters and water courses** ⇨247(2)

Where flood waters had widened channel of river in which defendants maintained on servient tenement, a dam to divert water into an irrigation ditch from 90 to 300 feet, soil near head of ditch consisted of bare river sand, and course of river did not remain stationary, defendants were improperly restrained from invading the river banks to anchor a replacement dam, from extending the old dam, from damming any point in the channel except along the old dam and a prolongation thereof, and from extending the old ditch to reach future changes in the river bed.

**20. Waters and water courses** ⇨243

Where defendants were entitled to maintain on servient tenement a dam to divert water from river into an irrigation ditch, defendants were properly restrained from using the soil of the servient tenement to repair the dam, and owner of servient tenement was properly enjoined from interfering with defendants' secondary easement of rights of way to repair dam.

**21. Waters and water courses** ⇨247(2)

Where defendants' right to use a ditch on servient tenement and to construct, repair and maintain a dam at the head thereof to obtain water to irrigate defendants' land was conceded by the pleadings in injunction suit trial court properly fixed the rights of the respective parties to the ditch and the waters therein.

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Appeal from Superior Court, Tulare County; Andrew R. Schottky, Judge Assigned.

Actions by Kate H. Hannah against J. W. C. Pogue, also known as James Pogue, and also known as Jim Pogue, to restrain defendant from entering plaintiff's property and using the soil, sand, or any part thereof to repair a dam located thereon. Defendant and Harley Smith filed a cross-complaint against plaintiff and the Regents of the University of California. Action by Kate H. Hannah against J. W. C. Pogue, also known as James Pogue and also known as Jim Pogue, and another to re-

strain defendants from maintaining a dam on plaintiff's land at any point except in a described location, and action by, Kate H. Hannah against J. W. C. Pogue to quiet title to realty. The cases were consolidated for trial. From adverse judgments, defendants appeal.

Judgments in accordance with opinion.

McFadzean & Crowe, of Visalia, for appellants.

Conley, Conley & Conley, of Fresno, for respondent Hannah.

Calkins, Hall, Linforth & Conard, of San Francisco, for respondent Regents of the University of California.

GRIFFIN, Justice.

This appeal resulted from the judgments of the trial court in three out of four cases which were consolidated for the purposes of trial. The evidence which was offered and received in connection with the four cases was also considered by the trial court in connection with an order requiring the defendant Pogue to show cause why he should not be punished for contempt. The one case which is not included in this appeal was decided favorably to the defendants Pogue and Smith by the trial court, as were the contempt proceedings. No appeal has been taken from the two last-mentioned matters.

Plaintiff and respondent Hannah owned, in addition to other lands, practically all of section 7 of certain lands in Tulare County. Her property also included about 32 acres in section 18. The above-mentioned property was first acquired by plaintiff's husband in 1917. Upon the death of Mr. Hannah in June, 1925, the plaintiff became the owner of all of the real property here involved. That property was encumbered by a mortgage in favor of the defendant the Regents of the University of California. The Kaweah River traversed in a southwesterly direction through section 7 of plaintiff's property. Defendant Smith, for many years, owned ranch property south and west of section 7 above mentioned. Defendant Pogue purchased that property from Smith in 1928 or 1929 under an executory contract of sale. About 1860, apparently by the consent of the then owner, a dam was constructed across the Kaweah River in section 7 near the easterly line thereof on property now owned by plaintiff and a diversion ditch, called the

Hamilton Ditch, was at the same time constructed. This ditch led from the south end of the dam and followed a meandering course in a general southwesterly direction across plaintiff's property to property owned by the predecessors of Smith, which is now being purchased by Pogue. This prescriptive right is not disputed. The contract of sale included these rights. Defendant Pogue, in 1937, purchased from the defendant California Western States Life Insurance Company, under an executory contract of sale, practically all of section 8 which lies immediately east of plaintiff's property described as section 7.

At the time Smith first became acquainted with the Hamilton Ditch a rock dam was maintained at about right angles to and across the Kaweah River near the point where that ditch takes out of the river for the purpose of diverting water from the river into the head of the ditch. In 1920, defendant Smith rebuilt the dam out of cement. At that time section 7 was owned by plaintiff's husband, and apparently this work was done with his consent and approbation. Because of the sandy character of the bed of the Kaweah River at the site of the dam, the cement dam sank down into the river, the same as its rock predecessors, and the defendant Smith built a second cement dam right on top of it, and then built still another dam on top of that one, due to their settling down in the sand to the level of the river bed.

It is necessary to cross the property of the plaintiff Hannah in order to gain access to any portion of the Hamilton ditch which is located thereon, and to maintain and repair the dam. The plaintiff testified that defendant Smith, for many years, entered her property and crossed the same from west to east for the purpose of making repairs to the dam and ditch. The exact routes followed by Smith in maintaining the dam and repairing the ditch are not easily described. They will be hereinafter discussed at greater length.

Following his purchase of the Hamilton Ditch and the real property served thereby, Pogue continued to use the roadways or rights of way employed by Smith for the purpose of maintaining and repairing the dam and ditch. In 1933 Pogue rebuilt the headgate for the old wooden structure which had previously been used. About that time difficulties arose between plaintiff and Pogue, mainly over a lock which was placed by Pogue on the control gate of the new structure. Considerable correspond-



ence ensued between the parties. In February, 1936, which was the year immediately following the exchange of the correspondence above referred to, there were three distinctly high water stages in the flow of the Kaweah River and the waters of that river broke through and went around the north end of the dam which diverted water into the head of the Hamilton Ditch. It thereupon became necessary for Pogue to go upon the property of the plaintiff with men, teams, equipment and materials for the purpose of repairing the dam. Since the damage was done to the north end of the dam, it could only be repaired by going on that portion of the property of the plaintiff lying north of the Kaweah River. Defendant called the plaintiff by telephone to ascertain what route she would prefer to have him use in entering her property for the purpose of repairing the dam. She refused to allow him to enter her property on the north side of the Kaweah River for that purpose unless he would recognize certain claimed rights she had in the Hamilton Ditch. Notwithstanding the plaintiff's refusal to give him permission to enter her property on the north side of the Kaweah River, Pogue cut the wire fences, entered the same with teams, equipment and materials, and undertook the repair of his dam on the following day. In so doing he followed a course near the north bank of the river. He used some dirt, brush and tree limbs taken from the property of the plaintiff in his first attempt to repair the breaks around the north end of his dam. Plaintiff immediately commenced the first of her four actions.

In that action, numbered Superior Court No. 25,827, she prayed for and obtained a preliminary injunction restraining the defendant Pogue from entering upon her property and from using any of the soil, sand or any other property comprising a part thereof or located thereon. The effect of the restraining order was to preclude Pogue from maintaining either his ditch or his dam. Pogue later agreed with plaintiff's then attorney that he might continue going upon the property notwithstanding the temporary restraining order but conditioned that he was not to use any more soil or brush or tree limbs in his endeavor to save his dam. The restraining order was modified accordingly, on March 14, 1936. Pogue thereupon continued to

haul rock and dirt upon the property of plaintiff and to extend the north end of his cement dam to the north bank of the Kaweah River, by depositing the rock and dirt in a gap which had been washed between the two by the high waters of the river. The repairs to the dam were completed within a short space of time. The first action was allowed to remain dormant during the remainder of 1936, and until the last of April, 1939, when Pogue and Smith filed their answer and original cross-complaint in that first action.

During the month of August, 1936, it became necessary for Pogue to make additional repairs to both ends of his dam, and at the request of the plaintiff he changed the route of his entry to the north end of the dam from a route which to some extent followed the north bank of the Kaweah River to what will hereinafter be referred to as the Olivera route.

In February, 1937, the Kaweah River reached a flood stage of 13,000 cubic feet of water per second. As a result, the channel of the river was widened and materially changed its course. The river then went completely around the north end of the dam at the head of the Hamilton Ditch and completely around the rock and dirt and sand wing which had been added to the north end of the dam in the spring of 1936. The channel of the river at that point was doubled in width. (At the time the concrete dam was built the channel then measured about 90 feet in width.) During that flood, the river deposited a huge sand bar in that portion of its channel immediately in front of the cement dam which had theretofore diverted water into the Hamilton Ditch. The extent and size of the sand bar which completely obstructed the head of the Hamilton Ditch and which extended upstream from the dam for a distance of several hundred feet, extended from the south bank of the Kaweah River to the rock jetty or remains of the old rock, sand and dirt wing at the north end of the cement dam. For the purpose of obtaining water from the Kaweah River into the Hamilton Ditch in 1937, Pogue first had the sand cleared out of the head of the ditch and then extended the same through the sand bar in an attempt to get water into the ditch by gravity. This operation was not successful, and as an emergency measure, a Kingsburg Pump was installed on the sand bar in front of

the cement dam and water was pumped into the Hamilton Ditch by means of that pump.

During this same year there was some interference by plaintiff with Pogue's secondary easements, i. e., the roads by which he gained access to the south end of the dam and also gained access to that portion of the Hamilton Ditch which is located upon the property of the plaintiff. One of the roadways used by Pogue began at the southwest corner of section 7 and followed along the edge of the bench land on high ground toward the head of the Hamilton Ditch. It was intersected in the middle by a second road which extended south to the south line of that section. In 1937, when flood waters of the Kaweah River had doubled the width of its channel and had deposited a sand bar in the channel which completely obstructed the head of the ditch, it became necessary for Pogue to do a great deal of work in order to obtain any water from the river for the irrigation of his properties. He found that a part of the plaintiff's lands which embraced a portion of both of the routes he had been using to gain access to the ditch and the south end of his dam, had been plowed up and planted to cotton for the first time in its history, and that to the same extent the two roadways which he had been using for the purpose of gaining access to his ditch and the south end of his dam, had been plowed up and destroyed.

Thereafter, and pursuant to some claimed agreement with the son-in-law of the plaintiff, Pogue moved the roadways which he had been using to a point north of the Hamilton Ditch in the vicinity of the cotton field, and built a new roadway and installed gates in the fences. In the spring of 1938, flood waters again visited the Kaweah River. There was a tremendous widening of the channel of the river at the head of the Hamilton Ditch, a change in the course thereof at that point, a washing away of a part of the point on the southerly bank of the river immediately upstream from the head of the Hamilton Ditch, and it would appear that a dam constructed along the same line as the cement dam would no longer be at right angles to the flow of water in the Kaweah River.

About June, 1938, Pogue consulted engineers in an endeavor to determine the best plan to maintain a water supply for the Hamilton Ditch. He then began the construction of a new dam, known as the

wing type, and this is the main and most important matter concerned in these consolidated actions.

The second action, Superior Court No. 28,452, also involves the defendants' right to maintain that part of the Hamilton Ditch which is located upon the property of the plaintiff and the defendants' right to maintain the dam which diverts the water from the Kaweah River into the ditch. The judgment therein restrains the defendants Smith and Pogue from maintaining a dam in the Kaweah River at any point except in a location described in the judgment as beginning at a point where the southerly end of the old cement dam is located, and thence extending north 40 degrees west, along the line of the old cement dam, "to the north bank" of the Kaweah River, "said dam to be constructed, without damage to plaintiff, or to the real property of plaintiff", and requires that said defendants remove the new dam and all of the earth, rock and sand with which the same has been constructed, from the present location in the bed of the Kaweah River, and requires them to fill the ditch which was cleaned out or constructed through the sand bar in the channel of the river so that the same shall be permanently obliterated.

[1] Defendant Smith first maintains that he is not a proper or necessary party to be restrained under the injunction order. By the pleadings Pogue and Smith filed an answer and cross-complaint in the injunction proceeding wherein they "admit that for more than 20 years last past, they and their predecessors in interest, have maintained and now maintain a dam across said Kaweah River." Defendants also admit that Pogue entered upon the plaintiff's land for the purpose of repairing and maintaining said dam and "intends to continue entering upon said land with necessary equipment for the purpose of maintaining and repairing said dam"; that defendants and their predecessors in interest have been for more than 20 years using and are now using certain described rights of way for such purposes. Under the pleadings and the evidence the trial court was justified in naming defendant Smith as a necessary party to the injunction. *Mitau v. Roddan*, 149 Cal. 1, 6, 84 P. 145, 6 L.R.A., N.S., 275.

In June, 1938, the river was not confined to a channel approximately 90 feet in width running in a southwesterly course

and at right angles to the face of the dam. On the contrary, it was sweeping past and around the north end of the dam in a channel which was then over 300 feet wide. The channel of the river immediately upstream and immediately downstream from the dam had been covered by a tremendous sand bar, and the head of the Hamilton Ditch was filled with sand. The ditch was no longer on a straight stretch of the river but occupied a position on the inside of a curve in the river channel. Defendant Pogue was advised and believed that an extension of the cement dam along the line thereof to the northwest would be pointed downstream, and towards the most vulnerable outside bank of the curve on which the head of the Hamilton Ditch was then located, and that an extension of the dam along the line thereof to the northwest would have pointed the waters of the Kaweah River towards the north bank thereof and would not enjoy the protective covering of any sand bar and would have resulted in further and extensive washing away of the lands of the plaintiff on a northerly and curved bank of the river.

The exact location of the new dam as constructed does not extend across the Kaweah River in a northwesterly direction as did the old cement dam. The evidence shows that the northerly end of the new dam was about 950 feet east of the point where the old concrete dam would have reached the northerly bank of the stream if it had been extended. The angle of the new dam to the stream differed materially from the angle at which the old concrete dam met the stream. The new dam was a wing dam extending up the river and was originally approximately 470 feet in length. It was not of concrete, but made up of rock and other materials brought onto the property and dumped into the river. The new dam crossed the river from the north bank thereof in a southwesterly direction, and the southerly end of the rock portion thereof meets the sand bar in the channel of the river at a point approximately 192 feet northeast of the northerly end of the old concrete dam. It is defendants' contention that a substantial portion of the new dam consists of the capped or surfaced remains of the sand bar which was created between the south rock portion of the dam and the headgate of the Hamilton Ditch, which comprises the 192 feet, and that as so built and arranged, it so closely parallels the south bank of the river

immediately upstream from the south end of the old cement dam that the dam and the river bank in effect create a ditch leading to the headgate and that the rock portion of the dam and the ditch together, as constructed, form a completed dam which can be said to lead from the southerly end of the old cement dam.

It is plaintiff's contention that the new dam was built at a different place in the river than the old concrete dam, and that the easement previously enjoyed could not be thus changed or so extended; that the digging of the ditch from the headgate to the south end of the rock portion of the new dam was an extension of the Hamilton Ditch over additional property of plaintiffs and substantially invaded her property rights and increased the burden of the easement and was therefore not permitted under the previously acquired easement.

It is further contended that the nature of the new dam was such as to divert the force of the river toward the south bank and the head of the new ditch; that the old dam had the effect of ponding the water, with incidental benefits of sub-irrigation to the plaintiff's land; that the new dam simply diverted the force of the current toward the south bank of plaintiff's property; that the height of the water behind the new dam was higher than the height of the old concrete dam; that there was danger, not only to the immediate banks of the stream from the presence of the new dam, but the likelihood that, in times of high water, the river itself would cut straight across the plaintiff's property; that plaintiff's ranch is in the delta region of the river, and the surrounding land consists of silt; that under such circumstances the likelihood of a complete cutting through of the property by force of the stream is always present if the natural current of the river is interfered with by obstructions such as the new dam here in question; that by reason of the construction of the dam the river washed out considerable portions of the soil constituting plaintiff's property on both the north and south banks of the river; that the length, width and function of the two structures are dissimilar.

Defendants contend that the court's judgment completely ignores the changes wrought in the channel of the Kaweah River by the flood waters of 1937; that it ignores the fact that next year or ten years from now flood waters may wash around



the south end of the dam which it permits defendants to construct and under the terms of the judgment the appellants will have no right to extend their dam south of its point of beginning; that it completely ignores the greater possibility that the dam which it permits the defendants to construct will point the waters of the river towards the most vulnerable outside curve in the north bank of the river and may cause the river to change its course to the north at that point; that this would not only render a dam constructed in the manner and along the lines sanctioned by the judgment utterly useless but would destroy many acres of the plaintiff's property.

It is then argued that the new dam, as constructed, did not invade plaintiff's property on the south bank of the river at any point and that it was ultimately anchored on the north bank of the river on property which is being purchased by Pogue from the California Western States Life Insurance Company; that under the judgment as worded, defendants would be unable to anchor the northerly end of a dam to the bank of the river; that even if that be permitted under the wording of the judgment, the north bank of the river was composed of silt and river sand and it would therefore be impracticable to so anchor it there; that the change in the location of the dam at the head of the Hamilton Ditch in no manner affected the substance of the easement as a means of getting water from the river into the head of the ditch; that the channel is confined to exactly the same purposes for which the old cement dam was used and that it does not create any added burden on the property of the respondent. It is therefore argued that defendants should not be required to move their dam from a safe location to an unsafe location merely because its predecessor, under different river channel conditions, had occupied a portion of such unsafe position.

The third action filed, Superior Court No. 28,587, involved the title to a triangular strip of land between sections 7 and 8 above mentioned, i. e., it is an action to determine which is the north and south dividing line between those sections. Engineers for both plaintiff and defendants testified as to their survey of the dividing line in question and each attacked the method of determination adopted by the others in their pursuit of the determination of the

proper line. The trial court did not adopt the lines or uphold the views of the surveyors or engineers for either plaintiff or defendants but on the contrary found that an old established fence line near the lines as surveyed was the proper and agreed boundary line between said sections. The evidence indicates that this fence line had existed for many years, in fact, long before the Hannahs or Mr. Pogue acquired their respective properties. The findings fixed the boundary line according to the established fence line and quieted the title of the respective parties accordingly.

The trial court made separate findings in each case herein involved. As to Superior Court case No. 25,827, the trial court found generally, insofar as the issues here are concerned, in accordance with the facts above related; and that defendant Smith was the owner of the legal title to the easements for maintenance of a dam across the Kaweah River as described in its judgment above mentioned, and the easement for the Hamilton Ditch as it existed prior to the construction of the new dam. The court then found that plaintiff Mrs. Hannah caused the dirt road along the secondary easement of right of way south of the river to be plowed up and to be obstructed by fences without making any provision for gates, and that she padlocked such gates as were used by defendants in gaining access to their ditch and dam. The court then found that by reason thereof defendants "suffered injury and damage \* \* \*" but that the court is unable to determine from the evidence introduced the amount of said monetary damages, and the court therefore finds that neither of the cross-complainants have been damaged in the sum of \$10,000 or in any other sum." This finding was followed by the finding that defendants were entitled to a secondary easement, i. e., a right of way for road purposes across plaintiff's land south of the Kaweah River as particularly described.

[2,3] Defendants now complain because the court refused to give a judgment in their favor on the issue of damages. Defendants' proof of damage was speculative and at least confusing and uncertain. In view of the evidence the court was justified in its failure to find any particular sum as monetary damages. 8 Cal.Jur. p. 909, § 142. The evidence fully justified the court's finding in reference to the easement for road purposes south of the Kaweah River,

which easement was given to the defendants. *Vargas v. Maderos*, 191 Cal. 1, 3, 214 P. 849. The court then found that defendants were entitled to an easement of right of way for road purposes north of the river, and described it with some particularity. The court granted a new trial in reference to this particular issue only. No further proceedings were taken in that respect in the trial court, so that portion of the finding and the portion of the judgment based thereon is not now pending before us for consideration. The court then enjoined the defendants Pogue and Smith from entering upon plaintiff's land except over the right of way described, and from using any of the soil, sand or other materials on her property for any purpose. The court also restrained plaintiff from interfering in any manner with defendants' enjoyment of the easement of right of way for road purposes above described, for their operation of the Hamilton Ditch as originally constructed, and restrained her from interfering with the defendants' construction, maintenance and operation of the dam at the site described in the judgment. A similar finding and judgment was entered in Superior Court case No. 28,452, and in addition it was found that plaintiff had suffered damages by reason of the erection of the dam at the new site, but also found that the court was "unable to determine, from the evidence introduced, the amount of the monetary damage theretofore suffered by plaintiff", and accordingly found that there was no sum due her for that reason. It was then expressly found that "the new ditch referred to and described in these findings of fact was not, at any time or at all and is not a part of said old Hamilton Ditch. Said new ditch was and is constructed wholly over and upon lands owned solely by plaintiff and said new ditch forms a connection between the Kaweah River above the dam hereinbefore described, and the said Hamilton Ditch." The trial judge, after visiting the scene, concluded that the new earth, rock and sand dam referred to and the new ditch above mentioned were at all the times mentioned constructed and maintained in their entirety wholly without right and contrary to the rights of plaintiff. Judgment was rendered accordingly.

As to the question of the evidence in Superior Court case No. 28,587 supporting the findings and judgment, we are convinced that the trial court was justified in the conclusion reached in reference to

adopting the established fence line as the proper dividing line between sections 7 and 8 above described.

[4] While the evidence is not so conclusive in its nature as to have compelled the trial court to find in favor of an agreed boundary, the evidence in this respect does show that the fence north of the segregation corner existed for at least 20 years prior to the acquisition of the Hannah ranch by the present owner. There is evidence that portions of the fence crossing the river had been washed out or down the river on several occasions during those years. However, the evidence shows that the fence was replaced. Whether or not it was replaced at its former location was in dispute. The court heard all of the evidence on that subject and was in a better position than this court to determine that question. There is sufficient evidence to support the finding of the trial court in this respect. There is also evidence that along this fence line are or were trees and bushes as well as a power line leading to a pump house located on the Hannah property. Other similar circumstances were considered by the court in respect to this established fence line.

[5-9] Appellant urges that there is no proof that there was ever any uncertainty or agreement as to the location of the true boundary line. Although there is no direct evidence to that effect, yet the facts found to exist justify the inference that the previous owners had agreed upon the location of the boundary line. An agreement fixing a boundary line need not be established by direct evidence but may be inferred by conduct, and especially by long acquiescence. The agreement must be express or implied from the acts of the parties and acquiesced in for the period fixed by the statute of limitations. A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both of the adjoining owners have definitely defined such line by erecting a fence or other monument on it and both have treated the same as fixing the boundary between them for such length of time that neither ought to be denied the correctness of its location. *Board of Trustees v. Miller*, 54 Cal.App. 102, 201 P. 952. Whether other testimony of the parties is sufficient to overcome the justifiable inference from long acquiescence under the circumstances shown, involves the weighing of conflicting evidence, a function ex-

clusively of the trial court, and is not a question of law within the province of the court of appeal. *Todd v. Wallace*, 25 Cal. App.2d 459, 464, 77 P.2d 877; *Clapp v. Churchill*, 164 Cal. 741, 745, 130 P. 1061. This is especially true in the instant case since there is no clear and satisfactory showing that the legal boundary line is different from what is indicated by the fence. *Perich v. Maurer*, 29 Cal.App. 293, 155 P. 471.

[10-12] Appellants further complain that the decree leaves a description of the boundary line in a vague and uncertain condition and incapable of location from the description given therein. While there is some merit to this complaint, the decree specifically describes the lines as surveyed by the surveyors for each party. The variations between those lines, as thus surveyed, form a triangle of land with its apex located at the segregation or meander corner on the east line of section 7 as shown on the plats of the United States Government survey. The area of the triangle thus formed consists of about 7.5 acres. The real property thus specifically described is outlined in red on a map or plat attached to the judgment and by reference made a part of it. On that map or plat the court has designated certain points, and described them, and has decreed that "a boundary fence exists on said real property, running northerly from the apex of the said triangle of land and cutting the base of the said triangle of land at a point approximately 35.3 feet east of the westerly termination of said base of said triangle. \* \* \*

When considered in connection with the plat and the lines established by the respective parties, it cannot be said that the line thus established in the decree is so uncertain as to description that it cannot be sufficiently identified or located. *Newport v. Hatton*, 195 Cal. 132, 231 P. 987. The decree quieting the title to property of both defendants and plaintiff in respect to said line was proper. In an equity suit in which all of the parties are before the court, it is the court's duty finally to determine the respective rights of the parties to the land and dispose of all of the issues presented by the pleadings. *California, etc., Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 P. 593; 10 Cal.Jur. p. 559, § 96; 22 Cal.Jur. p. 190, § 58.

The remaining question here involved is, no doubt, the main and most perplexing question presented on this appeal.

At the outset, it cannot be denied that defendants have a recognized right to use the Hamilton Ditch and to construct, repair and maintain a dam at the head of that ditch for the purpose of obtaining water from the Kaweah River with which to irrigate their lands. The court so found and such right is conceded by the pleadings.

[13, 14] The evidence conclusively shows in this case that the stream had been obstructed by deposits, from natural causes, of gravel in its bed so as to prevent the flow of water to defendants' ditch. Under these circumstances the duty of making the repairs essential to their employment of the easement devolved upon defendants and the owner of the servient tenement was under no obligation to remove these obstructions to the enjoyment by defendants of their right to the water. In the exercise of this right, defendants, in a reasonable and proper manner, without damage to the plaintiff, may make such an alignment of the stream, and perform such acts, as are essential to their enjoyment of the water. *Ware v. Walker*, 70 Cal. 591, 596, 12 P. 475, 476. The factual background in the cited case is so similar to the undisputed facts in the instant case that we feel impelled to recite it and quote from that case in so far as it may affect the rights of the respective parties here involved. There the plaintiff Ware obtained a final decree perpetually enjoining the defendant Walker from interfering with the ditch or dam of Ware in the bed of the Arroyo de los Gatos upon the land of the defendant, or from obstructing the flow of the water of said arroyo into said ditch. Plaintiff there, among others, appropriated certain water of that river, at a time when the land which was later owned and possessed by the defendant was still the property of the United States government. The water was taken out from the bed of the stream at that time with the approval of the party then in possession of the land, and he afterwards obtained a patent for it. As part of the ditch which conducted the water to the plaintiff's land the bed of the arroyo was used. After a time, when the defendant had become the owner of the land, he was not willing to allow the plaintiff to appropriate and use the water. When plaintiff undertook (by reason of the changes in the bed of the stream having diverted the flow of the water from the head of the ditch) to go higher up in the bed of the stream, which belonged to the defendant, and construct



therein at another point on his (defendant's) land, a certain dam and extension of the ditch, so as to again cause the water to flow into it, the defendant tore down the dam, and obstructed so much of the ditch as was upon his land above the original point of appropriation. It was to prevent further action of that kind, and to maintain his control over the water thus flowing over a portion of the defendant's land, where the original ditch had not run, that the plaintiff brought the action. The court held that the conduct of the defendant in the premises was not justifiable; that the plaintiff was entitled to use the water of the stream to which he had obtained the right of appropriation prior to the defendant's ownership of the land through which the water flowed in its natural current. The court then said:

"All that the plaintiff did in securing to himself the continued use of the water to which he had thus become entitled was to go higher up in the bed of the stream than he had originally done, and dig out a small ditch or channel in the gravelly surface thereof through a bar that had been formed by freshets in the stream, and erect, at the head of such ditch, a wing-dam to divert the waters of the stream, in the usual quantity that he had hitherto used, down along its bed into his original ditch. At no point where he thus used the bed of said stream (owing to the height of the banks thereof) could the defendant make any beneficial use of the water thus taken; and no portion of his land, available for any useful purpose, was invaded or taken. In fact, all that the plaintiff did was to remove obstructions to the flow of its waters from the bed of the stream, higher up on the defendant's land than the point from whence such waters could be originally diverted into the ditch. The plaintiff did nothing more of injury to the defendant than if he had removed a number of fallen trees which might have been washed down by the floods of winter, and which had lain across the stream, obstructing the flow of the water, and causing it to run upon the farther side away from the plaintiff's ditch; and such action was lawful. The plaintiff, by the construction of his ditch, and the appropriation and user of the water of the stream, acquired, as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant.

Where the use of a thing is granted, everything is granted essential to such use. Such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement." (Citing cases.)

In the instant case, upon a similar set of facts as there presented, the trial court concluded that plaintiff's property had been invaded by defendants, required them to remove the present dam structure and ditch, and then prescribed an exact place where the dam could be built or extended and provided that no other place or site could be used by defendant for the purpose of supplying water to the head of the Hamilton Ditch.

Defendants concede that their right to use the Hamilton Ditch, and a dam at the head of that ditch, for the purpose of obtaining water from the Kaweah River with which to irrigate their lands, is a burden upon the servient tenement owned by the plaintiff; that the defendants in the legitimate exercise of their well-established and recognized right to maintain a dam in the river at the head of the ditch have obstructed the flow of the waters of the river in the channel thereof and that such obstruction of the flow of the waters of the river has constituted and now constitutes some hazard to the banks thereof. However, it is argued that the very nature and purpose of a dam employed to divert water from a river into an irrigation ditch necessarily involves obstructing the otherwise unhampered flow of the waters of the river and necessarily involves some hazard to the banks of the river.

[15] Plaintiff has cited many cases which properly state the rule forbidding changes in the character of an easement, and prohibiting any material increase in the burden thereof upon the servient estate. Defendants do not question the rule of law or its application to the facts of the cited cases where it appears, but believe that the facts of the cited cases are readily distinguishable from the facts of the cases involved in this appeal. *Felsenthal v. Warring*, 40 Cal.App. 119, 180 P. 67, 70, is typical of the authorities relied upon by the respondent. In that case the plaintiff owned 137½ acres of land adjoining Hopper Creek in Ventura County, of which no more than 13 acres were suitable for cultivation. The defendants owned a ditch which took out of said creek at a point on the plaintiff's property, and which extended from said point across the prop-

erty of said plaintiff to the lands of the defendants. Flood waters eroded the bank of the stream on which the ditch was builded so as to move the westerly bank of the stream several feet farther west than it had previously been and a section of the ditch was washed away. Thereupon the defendants reconstructed 350 feet of their ditch 25 to 40 feet west of the former ditch line. It will be noted in the cited case that the defendants did not confine their repairs to the bed or channel of the creek, but undertook to build a new ditch outside of the channel and up on a portion of the plaintiff's property which was suitable for cultivation and which was actually planted to corn at the time of its invasion by the defendants. The court was considering a ditch rather than a dam in that case but its decision indicates that if the defendants therein had confined their activities to the creek bottom where they would have done the plaintiff no injury, the plaintiff would not have been heard to complain, and would not have received injunctive relief against the defendants.

In the instant case the activities of defendant Pogue in constructing and maintaining the new dam have been confined to the bed or channel of the Kaweah River. There has been no new ditch constructed on the banks of the river or upon any portion of respondent's property suitable for cultivation or planted to any crops. The property here involved at the head of the Hamilton Ditch is nothing more than pasture land, overgrown with trees and underbrush. Its exact character is amply illustrated by numerous photographs which were received in evidence. There is nothing in the case of Felsenthal v. Warring, *supra*, which decides that the defendants therein did not have the right to adapt their dam in the bed or channel of Hopper Creek to its increased width as occasioned by the flood waters which washed away a section of their ditch. On the contrary, that decision recites that nothing in the case of *Ware v. Walker*, *supra*, "is inimical to" the views herein expressed.

[16, 17] *Oliver v. Agasse*, 132 Cal. 297, 64 P. 401, is comparable in point of facts to the case of *Vestal v. Young*, 147 Cal. 715, 82 P. 381, and each has nothing in common with the facts of the instant case. They involve the substitution of a pipe line for an open ditch, or an open ditch along an entirely different line formerly occupied under the easement. Even those authori-

ties indicate that not all alterations in the mode of enjoyment of an easement are prohibited, but only those which impose an increased restriction upon the right of the owner of the servient tenement to the enjoyment of his property. *Allen v. San Jose Land & Water Company*, 92 Cal. 138, 28 P. 215, 15 L.R.A. 93, is also factually different. It involved a substitution of a pipe line for an open ditch. *Winslow v. City of Vallejo*, 148 Cal. 723, 84 P. 191, 5 L.R.A., N.S., 851, 113 Am.St.Rep. 349, involved a replacement of a 10-inch pipe line with a 14-inch pipe line. In *Kern Island Irrigating Co. v. City of Bakersfield*, 151 Cal. 403, 90 P. 1052, it was held that an easement for the use and maintenance of a small ditch through the city of Bakersfield did not entitle the owner of such easement to construct a ditch having a capacity five or six times greater than the original ditch. *Fletcher v. Stapleton*, 123 Cal.App. 133, 10 P.2d 1019; *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 P. 69; *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425, 90 P. 1053, 13 L.R.A., N.S., 904, and *Matthiessen v. Grand*, 92 Cal.App. 504, 268 P. 675, are also cited by plaintiff. The facts therein are wholly dissimilar to the facts in this case and are not contrary to the holding in *Ware v. Walker*, *supra*, where the facts are similar. That case has been approved by numerous and more recent decisions of the Supreme Court of this state, including the case of *Ward v. City of Monrovia*, 16 Cal.2d 815, 108 P.2d 425, 429, in which it is said that *Ware v. Walker* states the well recognized rule "that an express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as the right to make repairs, renewals, and replacements. \* \* \* In such cases it has been recognized that an insubstantial change in the location of the means of diversion will not destroy the easement." Defendants have diverted their water from the Kaweah River for the irrigation of their lands. Such water has always been and is now being diverted from that river at the head of the Hamilton Ditch by means of a dam across it. The dam and ditch leading to the headgate is builded entirely within the bed or channel of the river which property cannot be beneficially used by the plaintiff for any useful purpose. The lower court recognized defendants' right to maintain a dam across that river at the head of the Hamilton Ditch for the purpose of diverting

water of the river and transporting the same into that ditch for the irrigation of the defendants' land. The defendants' right in such regard is recognized by the case of *Ware v. Walker*, supra, and other decisions. *Burris v. People's Ditch Co.*, 104 Cal. 248, 252, 37 P. 922; *Pacific Gas & E. Co. v. Crockett L. & C. Co.*, 70 Cal.App. 283, 294, 233 P. 370; *De la Cuesta v. Bazzi*, 47 Cal.App.2d 661, 670, 118 P.2d 909; *City of Gilroy v. Kell*, 67 Cal. App. 734, 743, 228 P. 400. We see no justification in the law, and no sound reason in fact, for limiting the defendants' right to exercise their easement for the construction and maintenance of such a dam, in the manner in which the same has been limited by the judgments of the lower court herein.

The record discloses that like many other comparable rivers in this state which have their origin in our higher mountains, the flow of the Kaweah River ceases entirely during the summer months of dry years. In flood years the flow of water in that river has been approximately 35,000 cubic feet of water per second. The soil in the neighborhood of the head of the Hamilton Ditch consists of bare river sand topped with approximately one foot of alluvial silt. Due to the varying flows of water in the Kaweah River, and the character of the soil in the neighborhood of the ditch, the course of the river does not remain stationary, but can and does change very rapidly in times of high water. The factors to which we have just referred not only show the absolute necessity for prompt action when repairs to the dam are required, but they also make it impossible to repair the dam, or to replace it without going beyond the strict confines of the particular strip of river channel on which the original dam was rested. It is obvious that the ends of a dam cannot be tied into the bare sand banks on either side of the Kaweah River without making at least some inroads into those banks. Any dam built up to but not into those banks would not long hold water. It is equally obvious that after flood waters have widened the channel of the river from the original width of ninety feet to a new width of approximately three hundred feet, a dam no more than ninety feet in length would be of no value for the purpose of diverting the waters of the river into an irrigation ditch. If future flood waters flowing in the Kaweah River at the head of the Ham-

ilton Ditch should cause the course thereof to veer to the north instead of to the west, a dam running in any northerly and southerly direction would be utterly valueless for the purpose of diverting water into an irrigation ditch having its head at the south end of such dam. It is equally obvious that the defendants should not be required to permanently exercise their acknowledged right to maintain a dam in the river at the head of the Hamilton Ditch in the manner now prescribed by the court by its judgment. It is also obvious that the defendants' right to use the ditch and a dam in the Kaweah River at the head of the ditch for the purpose of irrigating their lands is an empty and meaningless right, unless they are permitted to exercise the same, and unless they are permitted to maintain the dam in some manner adaptable to the characteristics and nature of the Kaweah River and its changing course. The lower court by its judgments in two out of the three cases here under consideration, restrained the appellants from maintaining any dam in the Kaweah River except at a site described as beginning at the south end of the old cement dam, and thence extending across the Kaweah River to the north bank thereof in a direction described as north 40 degrees west. Those judgments also prescribe that any dam constructed by the defendants in accordance with their terms shall be constructed without damage to the plaintiff or to the real property of the plaintiff.

The judgments of the lower court completely overlook the obvious fact that unless the defendants are permitted to build into the bare sand banks of the river for the purpose of anchoring both ends of any dam which they might construct along the line prescribed by the lower court, the waters of the river would immediately wash around the ends of any such structure. Any inroads into the banks of the river for that purpose would certainly constitute at least a technical invasion of the property rights of the plaintiff and could be construed as at least a technical violation of the injunctive terms of the judgment. There would also be at least technical damage to plaintiff and to her real property. The injunction of the lower court restraining the defendants from constructing any dam in the river except on a site specified therein is permanent in character. It is conceivable that the river might wash around the south end of any



new dam constructed on the site prescribed in the judgments. The defendants would then be permanently enjoined from extending their dam in a southerly direction to any new south bank of the Kaweah River, because any such extension would constitute a violation of the express provisions of the judgments, would constitute an invasion of the plaintiff's property which might ripen into a right, and would involve damage to her property. The trial court did recognize the defendants' right to span the gap between the north end of the old cement dam and the north bank of the river, which gap was caused by the river washing around the north end of the old dam.

Why should defendants be permanently enjoined from spanning any gap which may subsequently occur at the north or south end of the dam from exactly the same cause?

[18] It is apparent from the exhibits that since the change in course of the river channel the old cement dam pointed partially downstream from the head of the Hamilton Ditch, and any new dam constructed along the line of the old cement dam would point the waters away from the head of the ditch and towards the most vulnerable north bank of the river. Any such dam could not possibly be constructed to cross the Kaweah River at right angles to the flow of water therein. It would unquestionably cause the waters of the river to converge against the weak outside bank of a curve in the channel of the river, and the trial court determined that the maintenance of a new dam at such an angle to the flow of water in the river at that point would not materially increase the burden of the defendants' easements upon the servient estate of the plaintiff, or affect the substance of defendants' easements. If the defendants have the right to maintain a dam in the Kaweah River, they must have the right to make such repairs thereto and changes therein as are dictated by changes in the width and course of the channel of the river occasioned by flood waters which flow in it. Under the law the defendants have the right to maintain a dam wholly within the bed or channel of the Kaweah River for the purpose of the enjoyment of their easements in such a reasonable manner and not to needlessly increase the burden upon the servient tenement, and have

the right to make such repairs, renewals and replacements of that dam as may be required by the unpredictable conduct of the river which may result in a further variation in the width and course of its channel, without being tied down by the permanent restrictions contained in the judgments of the trial court.

[19] The trial court's judgment which in effect precludes defendants from invading the banks of the river for the purpose of anchoring the north end of their dam; that enjoins them from extending their dam to the south, even though the waters of the river may wash around the south end of their dam; that also enjoins them from building or maintaining a ditch or dam at any point in the channel of the river except along the line of the old cement dam and the prolongation thereof to the north bank of the river; that enjoins them from extending the old Hamilton Ditch to reach any future change in the bed of the river that may be caused by future floods; and that enjoins them from constructing any dam without damage to the property of the plaintiff, is not supported by the law or the facts, and therefore should be reversed.

[20, 21] That portion of the judgment in Superior Court case No. 25,827, which enjoins defendants from "using any of the soil, sand or any other materials on said real property of plaintiff" as alleged in the petition, that portion thereof enjoining plaintiff from interfering with defendants' secondary easement of rights of way for road purposes described, and that portion fixing the rights of the respective parties in and to the Hamilton Ditch as originally established and the waters therein, is affirmed.

The remaining portion of the judgment entered in Superior Court case No. 25,827, and the judgment entered in Superior Court case No. 28,452, involving, and which unduly limits, defendants' rights to construct or maintain a dam and ditch in the channel of the river except as prescribed by that judgment, are reversed.

The judgment entered in Superior Court case No. 28,587, involving the disputed boundary line is affirmed. Appellants to recover costs from plaintiff.

BARNARD, P. J., and MARKS, J., concur.

**In re LUCAS' ESTATE.**

**FEW v. BROWN.**

**Civ. 13906.**

District Court of Appeal, Second District,  
Division 1, California.

June 24, 1943.

Hearing Granted July 22, 1943.

**I. Statutes  $\S$ 231**

Provisions of Probate Code relating to compromise of claims against estate and to effect of statute of limitations on claims are "in pari materia" and must be read and construed together. Probate Code,  $\S\S$  708, 718.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Materia".

**2. Executors and administrators  $\S$ 213**

The bar of statute of limitations may not be waived as against an estate. Probate Code,  $\S$  708.

**3. Executors and administrators  $\S$ 269**

The question as to whether claim against estate is barred by statute of limitations must be determined directly and effectively before compromise of a claim allegedly barred by limitations may be approved. Probate Code,  $\S\S$  708, 718.5.

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Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 137 P.2d 709.

Edgar T. Fee, of Los Angeles, for appellant.

J. H. O'Connor, County Counsel, and Ernest Purdum, Deputy County Counsel, both of Los Angeles, for respondent.

**PER CURIAM.**

Respondent has petitioned for a rehearing in the above-entitled matter. Only the following points raised in the petition need be discussed, the others having already been sufficiently covered by the opinion herein. Respondent contends that the decision of this court nullifies the act of the

legislature in enacting section 718.5 of the Probate Code; and that this court has ignored one of its own prior decisions on the question.

[1] Respondent points out that section 718.5 grants authority to compromise "any claim against the estate" or "any suit", and calls attention to the fact that section 718.5 was passed by the legislature some years after the enactment of section 708; that therefore if there is any inconsistency between the provisions of the two sections those of the later statute must prevail. Sections 708 and 718.5 of the Probate Code, relating as they do to the same general subject of claims in probate, are in pari materia and must be read and construed together, although they may have been passed at different times. The rule involved is well established and amply supported by authority.

Respondent contends that the decision in the present case is contrary to and inconsistent with that in *Re Estate of Dobkin*, 38 Cal.App.2d 276, 100 P.2d 1091, 1092. The *Dobkin* case involved an appeal from an order and decree of final distribution, the appeal having been taken by an objecting creditor on the ground that two claims had been improperly allowed in the final account. The claims had been first rejected, suits were filed thereon and the representative of the estate interposed answers in the said suits. Thereafter a petition was presented to the probate court for permission to approve the claims thus sued upon, and the petition was granted. This court upheld the procedure there involved as proper under section 718.5, supra, stating: "\* \* \* the sole question for consideration is whether the court had authority to approve the two claims which had been first disallowed and thereafter approved by the court upon petition of the executrix after suit had been filed thereon." While the *Dobkin* case is similar to the one at bar, in that both are concerned with situations wherein compromise or settlement of a claim was approved by the probate court at a time when a suit on the claim was pending, it must be pointed out that in the *Dobkin* case the question of the propriety of such procedure was directly presented to this court and there passed upon; but in the present case the decision is not concerned with that question. The question here presented is whether the probate court may approve

the compromise of a claim without passing upon the effect of the bar of the statute of limitations, when that question has been brought to the attention of the court; and the decision made here is based upon the answer to that question alone. While the effect of the pending suit upon the probate court's power to approve the compromise presents an interesting phase of the case, it is not necessary here to pass upon this point; and it should also be mentioned that the precise point has not been raised.

It is true that in *Re Estate of Dobkin*, supra, this court stated that even though the claim were not a good claim in itself the authority for the court's action in compromising it is directly based upon section 718.5, supra. The statement, however, is merely dictum and was not necessary to a decision in the *Dobkin* case. The District Court of Appeal for the Third Appellate District has directly decided that the representative of an estate may not compromise an invalid or unenforceable claim, in *Re Guardianship of Carlon*, 43 Cal.App.2d 204, 110 P.2d 488, (petition for hearing denied by the Supreme Court, April 24, 1941). The *Carlon* case was concerned with the provisions of section 1530a of the Probate Code, providing that a guardian, with the approval of the court, may compromise any claim against the estate or any suit brought against the guardian as such; but the principles there discussed and the decision there reached apply with equal force to the matter of the compromise of a claim by an administrator of an estate under section 718.5 of the Probate Code.

[2,3] The difficulty in the case at bar is that it appears from the record that the probate court approved the compromise of the claim in question upon the ground that all objections to the compromise had either been withdrawn or waived. But the question of the bar of the statute of limitations had already been raised and had been properly called to the attention of the court.

The bar of the statute of limitations may not be waived as against an estate. The effect of the order of the probate court here is to waive the question of the bar of the statute. The effect of the decision of this court is that the question as to the bar of the statute of limitations must be determined directly and effectively before the compromise of a claim objected to on such grounds may be approved. Whether the probate court has the power to try and pass judgment on an issue pending in a valid action before the same court but in another department thereof, is not here decided. In *Kohn v. Rupley*, 54 Cal.App. 565, 202 P. 163, the appellate court was able to assume upon the record that the probate court had passed upon the question of the bar of the statute, but in the present case, upon the record before this court, the contrary appears true, and this court would not be warranted in indulging in any such assumption. The question then is not whether the probate court correctly decided the question as to the application of the statute, but whether there is any justifiable basis for assuming that the probate court, or some other department of the court, passed upon the question at all. As far as the record herein discloses, neither the probate court nor any other department of the superior court has ever decided whether the statute of limitations is in fact and in law a bar to the claim in question. Assuming, therefore, but not deciding, as above noted in substance, that the probate court in the circumstances has the power to pass judgment on that issue, the matter is remanded for further consideration.

Accordingly, the order heretofore made herein is hereby modified to read as follows:

The order settling and approving the final account of the administrator herein is reversed, appellant to have costs on appeal; and the matter is remanded for further consideration.

The petition for a rehearing is denied.



58 Cal.App.2d 799

**EVANS, Building and Loan Commissioner, v.  
SAN JOAQUIN COUNTY et al.**

Civ. 6842.

District Court of Appeal, Third District,  
California.

May 25, 1943.

Hearing Denied July 22, 1943.

**1. Taxation** ⇨696

The statute in effect at the time of a tax sale governs the right of redemption.

**2. Taxation** ⇨709(1, 3)

Under statute relating to redemption of realty sold for delinquent taxes, amount payable for redemption consisted of taxes due at the time of the sale, taxes that were a lien at the time such taxes became delinquent, and taxes assessed against the realty subsequent to the sale. Pol.Code, § 3817.

**3. Statutes** ⇨147

Ordinarily, any essential change in the phraseology of a statute indicates an intention of the legislature to change the meaning of the statute rather than to interpret it.

**4. Taxation** ⇨709(1, 3)

Where statute requiring payment of "all unpaid taxes of every description assessed against the property for each year since the sale," etc., for redemption of realty sold for delinquent taxes was amended to require payment of "all unpaid taxes of every description which are a lien against the property for each year since the sale" the amendment in view of statutes indicating that the legislature recognized a distinction between taxes "assessed" and taxes becoming a lien was intended to require taxes which have become a "lien against" such property for each year since the sale to be paid to effect a redemption, and the statute did not contemplate that to redeem, personalty taxes made a charge against the realty subsequent to the sale must be so paid. Pol. Code, §§ 3717, 3718, 3813, 3815, and § 3817, as amended by St.1937, p. 144.

See Words and Phrases, Permanent Edition, for all other definitions of "Assess".

Action by Ralph W. Evans, as Building & Loan Commissioner, etc., against the County of San Joaquin and others for refund of taxes. Judgment for defendants, and plaintiff appeals.

Reversed.

Roy D. Reese and James E. Burns, both of San Francisco, Robert W. Kenny, Atty. Gen., and C. H. McDonald, Sp. Deputy Atty. Gen., for appellant.

R. M. Dunne, Dist. Atty., and Chester E. Watson, Deputy Dist. Atty., both of Stockton, for respondents.

ADAMS, Presiding Justice.

Appeal from a judgment for defendants in an action for refund of taxes.

In the year 1936 certain real property in San Joaquin County was sold to the state for delinquent taxes. At that time Pacific States Savings and Loan Company held a trust deed upon the property. This trust deed was subsequently foreclosed, the property being sold to Pacific States on December 28, 1936. Appellant thereafter took possession of the property and assets of Pacific States, and, desiring to redeem, requested of respondent auditor a statement of the amount necessary to be paid in order to redeem. The estimate furnished included personal property taxes, a lien for which had been impressed upon the real property by the county of San Joaquin for the years subsequent to the sale to the state. Appellant objected to the estimate as to such personal property taxes, claiming that they were not chargeable under the redemption statute in effect at the time of the sale. However, he paid the whole amount under protest, and filed a claim with the board of supervisors of the county for the amount of the personal property taxes. His claim having been rejected, he brought this action to recover the amount thereof. A demurrer to his complaint was sustained without leave to amend, apparently on the theory that the provisions of section 3817 of the Political Code as they existed at the time of the sale to the state required that, in order to redeem, payment must be made of personal property taxes made a lien upon the real property subsequent to its sale to the state. That section at the time of the sale provided:

"In all cases where real estate has been sold, or may hereafter be sold to the State for delinquent taxes and the State has

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

not disposed of the same, the person whose estate has been or may hereafter be sold, his heirs, executors, administrators or other successors in interest shall, at any time after the same has been sold to the State and before the State shall have disposed of the same, have the right to redeem such real estate by paying to the county treasurer of the county wherein the real estate may be situated, the amount of taxes, penalties for delinquency, and costs due thereon at the time of such sale, and also all taxes that were a lien upon said real property at the time said taxes became delinquent; and also all unpaid taxes of every description assessed against the property for each year since the sale, as shown on the delinquent assessment rolls in the then permanent custody of the county auditor; or, if not so assessed, then upon the value of the property as assessed in the year nearest the time of such redemption, and also all costs and expenses of such redemption, and penalties as follows, to wit \* \* \*."

It was amended in 1937, St.1937, p. 144, by changing the words "all unpaid taxes of every description *assessed against* the property for each year since the sale," to read "all unpaid taxes of every description which are a *lien against* the property, for each year since the sale." (Italics ours.)

Appellant insists that as the personal property taxes in controversy were levied for the fiscal years 1937-1938 and 1938-1939, they were not taxes due at the time of the sale within the language of the foregoing statute (San Diego, etc., R. Co. v. Shaffer, 137 Cal. 103, 69 P. 855), nor taxes that were a lien upon said property at the time said taxes became delinquent; and that they did not come within the requirement of that statute that the redemptioner must pay "all unpaid taxes of every description assessed against the property for each year since the sale," because personal property taxes are not "assessed against" real property; and that the Legislature has distinguished between taxes "assessed against" property and those which are a lien against it, by the very terms of section 3817, and particularly by the amendment of 1937.

[1] It is conceded by respondent that the statute in effect at the time of a tax sale governs the right of redemption. (San Diego County v. Childs, 217 Cal. 109, 17 P.2d 734; Teralta, etc., Co. v. Shaffer, 116

Cal. 518, 48 P. 613, 58 Am.St.Rep. 194.) But respondent contends that "taxes of every description assessed against the property" for years subsequent to the sale do include personal property taxes—that they are taxes "assessed against the property"—that section 3717 of the Political Code automatically "charges unpaid personal property taxes against the real property"; and that "assessed" should be construed as meaning "charged" (citing 6 C. J.S., Assess, p. 1022). Appellant replies that the words "assessed against" are not to be given the construction contended for by respondent; that "assessed" means given a value so that apportionment of taxes may be made, and that to give it the meaning "charged" would make other sections containing the word "assessed" meaningless.

"Assessed against," however, may have been intended to have a meaning different from that which might be applied to the word "assessed," standing alone. But if "assessed against" was intended to mean "becoming a lien against," no reason appears why, having specified in section 3817, supra, as it formerly read, "taxes that were a lien \* \* \* at the time said taxes became delinquent" in the one phrase, it should not have used the same language instead of "taxes \* \* \* assessed against" in the one following.

[2] It is said by Judge Harrison, in his dissenting opinion in *Allen v. McKay & Co.*, 120 Cal. 332, 340, 52 P. 828, that the word "assessed" is used in the Political Code with different significations, and therefore the meaning to be given to it in any particular case is to be determined from the context and the subject matter in reference to which it is used. The question for us to determine is, then, what meaning the Legislature intended to give to it in section 3817 as it existed at the time the property in the case before us was sold to the State. Apparently the amounts payable for redemption consisted of three classes of taxes, to wit: (1) taxes due at the time of sale; (2) taxes that were a lien at the time said taxes became delinquent; and (3) taxes "assessed against the property" subsequent to the sale. The fact that the Legislature refers in (2) above to "taxes that were a lien," and in (3) to taxes "assessed against the property," indicates that a distinction between the two was recognized; and the fact that in 1937

it changed the language of (3) by substituting the words "assessed against the property" to read "which are a lien against the property," indicates to our minds that a change of meaning was intended, and not a mere interpretation of the words formerly used.

[3] Ordinarily any essential change in the phraseology of a statutory provision indicates an intention on the part of the Legislature to change the meaning of such provision rather than to interpret it. 23 Cal.Jur. 778. In *Loew's, Inc., v. Byram*, 11 Cal.2d 746, 82 P.2d 1, mandamus was sought to compel a tax collector to accept payment of general taxes on petitioner's property separately from special assessments under the Acquisition and Improvement Act of 1925, Stats.1925, p. 849; *Deering's Gen.Laws*, 1925-1927 Supp., Act 3276a, the collector contending that payments for special assessments could not be made separately from payment of county taxes. As originally enacted, section 41 of the act of 1925 provided that "Such special assessment taxes shall be in addition to all other taxes levied for state and county purposes, or for municipal purposes (as the case may be), and shall be levied, computed, entered, collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes for state and county purposes, or for municipal purposes (as the case may be), and all laws applicable to the levy, collection and enforcement of taxes for state and county purposes or for municipal purposes (as the case may be) are hereby made applicable to said special assessment taxes."

That provision was amended in 1927, Stats.1927, p. 1376, to provide that "Such special assessment taxes shall be in addition to all other taxes levied for county purposes or for municipal purposes, as the case may be, and shall be levied, computed, entered, collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes for county purposes or for municipal purposes, as the case may be, and all laws applicable to the levy, collection and enforcement of taxes for county purposes or for municipal purposes, as the case may be, are hereby made applicable to said special assessment tax." At the time petitioner's rights became fixed,

the statute as so amended was in effect. Subsequently and in 1931, St.1931, p. 1554, a provision was added reading: "Such special assessment taxes shall be collected and enforced together with, and not separately from, taxes for county purposes or for municipal purposes, as the case may be."

The court said, 11 Cal.2d at page 750, 82 P.2d at page 3:

"But it is insisted that the original section denied the right to pay separately and was fully as effective for that purpose as the amendment of 1931. There is a rule of statutory construction which leads to the contrary conclusion. That rule is stated and approved in *People v. Weitzel*, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811, from which we quote \* \* \*: 'In *United States v. Bashaw*, 8 Cir., 50 F. 749 [1 C.C. A. 653], it was said: "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."

" "Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred." In re *Segregation of School Dist. No. 58*, 34 Idaho 222, 200 P. 138. In *Rieger v. Harrington*, 102 Or. 603, 203 P. 576, 580, it was said: "By amending that statute, the Legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act." To the same effect are the following authorities: *Springfield Grocer Co. v. Walton*, 95 Mo.App. 526, 69 S.W. 477; *Duff v. Karr*, 91 Mo.App. 16; *Pierce v. Solano County*, 62 Cal.App. 465, 217 P. 545; *Shearer v. Flannery*, 68 Cal.App. 91, 94, 228 P. 549."

In *People v. Weitzel* [201 Cal. 116, 255 P. 793, 52 A.L.R. 811], above cited, a section of the Penal Code (165) dealing with offenses by members of common councils which formerly read "who receives or offers to receive any such bribe is punishable," etc., was amended to read "who receives, or agrees to receive any bribe upon any understanding," etc. The court held that this signified an intention on the part



of the Legislature to change the existing law, and the court then quoted from *United States v. Bashaw*, as quoted in *Loew's, Inc., v. Byram*, *supra*. Also see *Young v. Three for One Oil Royalties*, 1 Cal.2d 639, 646, 36 P.2d 1065; *Meyerfeld v. South San Joaquin Irr. Dist.*, 3 Cal.2d 409, 417, 45 P.2d 321; *In re Estate of Todd*, 17 Cal.2d 270, 274, 109 P.2d 913; *In re Estate of Broad*, 20 Cal.2d 612, 618, 128 P.2d 1; *Lundquist v. Lundstrom*, 94 Cal.App. 109, 112, 270 P. 696; 25 R.C.L. 1051; 59 C.J. 1097.

[4] Prior to the amendment of section 3817, *supra*, and subsequent thereto, section 3813 of the Political Code provided that *property sold to the state* should be "assessed" each subsequent year until a deed was made to the state. Section 3815 of that Code also provided during said times that property *assessed* pursuant to section 3813 should be redeemed only on payment of such subsequent assessments, costs, fees, penalties and interest. Section 3717 provided that every tax due upon personal property became a lien upon the real property of the owner thereof, from and after the first Monday in March of each year; and section 3718 made taxes due upon real property, and improvements

thereon assessed to others, liens upon such land and improvements, etc. These sections indicate that the Legislature recognized and at all times had in mind a distinction between taxes "assessed" and taxes that became a lien, and they fortify our conclusion that the amendment of section 3817 made in 1937 was intended to effect a change in the law to provide that taxes of every description, whether taxes on personal property belonging to the owner of the real property or taxes "assessed against" the real property itself, which had become a "lien against" said property for each year since the sale, should be paid in order to effect a redemption, and that the section as it previously existed did not contemplate that in order to redeem, personal property taxes made a charge against the real property subsequent to the sale to the state, must be so paid.

We therefore conclude that plaintiff's claim for a refund should have been allowed, and that the trial court erred in sustaining defendants' demurrer to plaintiff's complaint without leave to amend.

The judgment is reversed.

PEEK and THOMPSON, JJ., concurred.































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